REAUTHORIZATION OF THE MERIT SYSTEMS PROTECTION BOARD

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CIVIL SERVICE

OF THE

COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

AUGUST 3, 1993

Serial No. 103–19

Printed for the use of the Committee on Post Office and Civil Service

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REAUTHORIZATION OF THE MERIT SYSTEMS PROTECTION BOARD

TUESDAY, AUGUST 3, 1993

HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON THE CIVIL SERVICE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:05 a.m., in room 311, Cannon House Office Building, Hon. Frank McCloskey (chairman of the subcommittee) presiding.

Member present: Representative McCloskey.

Mr. MCCLOSKEY. Good morning. This hearing of the subcommittee will come to order.

I might note that it is almost certain that I will be the only Member here today. I know there is other interest on the committee; but, as you know, our esteemed colleague's funeral in Michigan is being held late this morning. Many of our colleagues are at that.

With that, we will go on with this very important hearing on the reauthorization of the Merit Systems Protection Board.

Today's hearing will focus on the reauthorization of the MSPB which was established by the Civil Service Reform Act of 1978. The Board is charged with safeguarding merit system principles and protecting Federal employees from prohibited personnel practices.

I am pleased to welcome the new Chairman of the Board, Hon. Ben Erdreich, a distinguished former colleague from Birmingham, AL. We have had occasion to talk in recent weeks. I am sure his background in labor law, his overall abilities and dedication will serve the Board well and boost Federal employees' rights.

The primary issues this morning are whether to permanently authorize the MSPB and whether MSPB judges should be granted Administrative Law Judge status. The Civil Service Reform Act of 1978 permanently authorized the MSPB and the Office of Special Counsel within the MSPB and established the Office of Personnel Management and Federal Labor Relations Authority, FLRA.

In 1989, however, with the enactment of the Whistleblower Protection Act, Congress established term authorizations for the Merit Systems Protection Board and the OSC. In addition, the WPA separated the OSC from the MSPB and made the OSC an independent agency of the Federal Government. The Post Office and Civil Service Committee and the Senate Governmental Affairs Committee wanted to maintain close scrutiny of MSPB and OSC.

The reauthorization process also allows congressional oversight committees a vehicle to make changes in the law, if changes should become necessary.

In the 102d Congress and again in the 103d Congress, Representatives George Gekas and Paul Kanjorski introduced legislation, H.R. 1889, to grant Administrative Law Judge status to the MSPB administrative judges. Some argue this status is needed in order to assure independence and impartiality. We will hear much on that this morning. Others disagree and believe the status quo has worked fine for 14 years and will continue to work.

Another one of the MSPB's key roles is to protect Federal employees who make protected disclosures under the WPA. In conjunction with this year's reauthorization of the Office of Special Counsel, the subcommittee will soon consider legislation to assure whistleblowers get a quick and fair hearing and to provide further protections against reprisal.

Ultimately, the WPA has to be interpreted by the MSPB and the Federal judiciary. I am particularly interested in hearing from Chairman Erdreich of the role of the MSPB in protecting whistleblowers.

Furthermore, 2 weeks ago the MSPB issued a decision in the case of *Brown* v. *U.S. Postal Service* that stated reassigning Mr. Brown, a St. Louis postal employee, to a lower position amounted to a reduction-in-force. The Postal Service has maintained it conducted its restructuring as humanely as possible by protecting jobs and pay and providing the same level of pay and wage grade for employees reassigned to lower level jobs.

This decision could have far-reaching consequences for the Postal Service, which just completed a massive downsizing and reorganization by authorizing early-out incentives. It could also have far-reaching implications as the Federal Government downsizes its work force.

Again, I look forward to working with Chairman Erdreich, who I expect will be a great advocate on behalf of Federal employees and our merit systems principles. Working together, I hope we can establish increased fairness and equity for Federal employees.

I want to thank all our witnesses for taking the time to appear and look forward to hearing from them.

[The prepared statement of Hon. Frank McCloskey follows:]

PREPARED STATEMENT OF HON. FRANK MCCLOSKEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Today's hearing will focus on the reauthorization of the Merit Systems Protection Board (MSPB) which was established by the Civil Service Reform Act of 1978. The MSPB is charged with safeguarding merit system principles and protecting Federal employees from prohibited personnel practices. I am pleased to welcome the new Chairman of the Board, the Honorable Ben Erdreich, a distinguished former colleague from Birmingham Alabama. Ben's background in labor law will serve the Board well and will hopefully boost Federal employees' rights.

The primary issues that will be discussed this morning are whether to permanently authorize the MSPB and whether MSPB administrative judges should be granted Administrative Law Judge status. The Civil Service Reform Act of 1978 permanently authorized the MSPB and the Office of Special Counsel (OSC) within the MSPB and established the Office of Personnel Management and Federal Labor Relations Authority (FLRA).

In 1989, however, with the enactment of the Whistleblower Protection Act (WPA), Congress established term authorizations for the Merit Systems Protection Board and the OSC. In addition, the WPA separated the OSC from the MSPB and made the Office of Special Counsel an independent agency of the Federal Government. The Post Office and Civil Service Committee and Senate Governmental Affairs Committee wanted to maintain close scrutiny of MSPB and OSC and therefore estab-

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Another one of the MSPB's key roles is to protect Federal employees who make protected disclosures under the WPA. In conjunction with this year's reauthorization of the Office of Special Counsel, this subcommittee will soon consider legislation to insure that whistleblowers get a quick and fair hearing and to provide further protections against reprisal. But legislative changes can only go so far. Ultimately, the WPA has to be interpreted by the MSPB and the Federal judiciary. I am particularly interested in hearing Chairman Erdreich's views on the role of the MSPB in protecting whistleblowers.

Furthermore, two weeks ago, the MSPB issued a decision in a case entitled, *Edward Brown* v. *U.S. Postal Service* that stated that reassigning Mr. Brown, a St. Louis postal employee, to a lower position amounted to a reduction-in-force. The Postal Service has maintained that it has conducted its restructuring as humanely as possible by protecting jobs and pay by providing the same level of pay and wage grade for employees who were reassigned to lower level jobs. This decision could have far reaching consequences for the Postal Service which has just completed a massive downsizing and reorganization by offering early out incentives. It could also have far reaching implications as the Federal Government downsizes its workforce.

Again, I look forward to working with Chairman Erdreich who I expect will be a great advocate on behalf of Federal employees and our merit systems principles. Working together, I hope we can establish increased fairness and equity for Federal employees. I want to thank all of our witnesses for taking the time to appear and look forward to hearing from them.

[The prepared statement of Hon. Dan Burton follows:]

PREPARED STATEMENT OF HON. DAN BURTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. Chairman, I want to thank you for holding this hearing today on the reauthorization of the Merit Systems Protection Board (MSPB). My colleagues have often heard me complain on the floor when the Appropriations Committee takes over the proper function of the House's authorizing Committees. The Appropriations Committee says that they have to do this because the authorizing committees have not done their job. I can't speak for the other committees around here, but we on the Civil Service Committee are fulfilling our responsibility by reauthorizing the MSPB, and I commend Chairman McCloskey and my colleagues for their initiative.

I also want to congratulate our former colleague Ben Erdreich on his new position as Chairman of the MSPB, and I wish him well in the future.

With respect to the MSPB, I would simply say that I believe it is very important that Federal employees get a fair and impartial hearing when they cannot resolve grievances with their agencies. I think that everyone in the room here this morning would agree with this sentiment. Several of our witnesses will be suggesting ways that they think the MSPB should do things differently. I am hopeful that this morning's hearing will illuminate the subcommittee on how we can help the MSPB achieve its mission, and as Ranking Minority Member, I look forward to working with the Chairman and my colleagues toward this end.

Mr. MCCLOSKEY. With that, our first witness this morning, Hon. George Gekas.

Congressman, great to have you today. Your formal statement is accepted for the record. You may proceed as you like.

I am new to the chairmanship this year. If you could educate me on your concerns as to the status of the MSPB judges, I would appreciate it.

STATEMENT OF HON. GEORGE GEKAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. GEKAS. At the outset, I want to join with the Chair in offering commendations to our former colleague, Congressman Erdreich, for his good step forward in accepting the position to which he has been appointed. We wish him luck. We offer our continued cooperation.

We also want to take note of the Chair's opening statement insofar as it referred to—properly so—one of the key features of the legislation which we are proposing and on which we wish to testify.

That feature is the independence that all of us seek for any body of judicial appointments, from the Supreme Court of the United States down to a local magistrate. That does, of course, include those judges who, under the Merit Systems Protection Board, find themselves in a uniquely adversely impacted situation because they are not truly independent.

That is the gist of our effort to try to have this legislation considered and passed.

Because if a whistleblower case, to which the Chair has already referred, or even a sexual harassment case comes before one of these judges, hanging over their heads, perceptibly or imperceptibly, visibly or invisibly is the notion that their future, the judge's future, the judge's present, the judge's salary, the judge's benefits are all dependent possibly by some inner workers on the outcome of the case on which that particular judge is involved. This is what we wish to obviate by the legislation which we offer.

Right now, Administrative Law Judges can act independently. They are rotated in such a fashion that independence is continued on a formal basis. And they are offered all kinds of protections for themselves and for the people whose cases they will be adjudicating, while the judges in the Merit Systems Protection Board do not have these protections.

Our bill slides or blends the concepts into a situation where, as Administrative Law Judges, the Merit Systems Protection Board judges will attain that aura of independence that will make them better judges, less pressure, shall we say, and at the same time offer to the millions of Federal employees that extra measure of approach to the judicial system within their system that will ensure them a fair, impartial hearing which is the goal of any body that is based on making judicial decisions and a principle on which you and I and other Members of Congress place in trying to develop legislation every single day, that fairness and impartiality that must be emitted first and foremost by the Federal Government through their various agencies and the judges in their employ who are in their place solely for the purpose of rendering a fair and impartial hearing.

We have undertaken to complete the information that your staff will find necessary—as your Members will also—to see what implications this would have salary-wise, et cetera; but we believe that that will work out just in a natural basis if we can just establish the theme of the transfer about which we speak.

With that, I am willing to close my statement with a note of optimism that, indeed, there should be very little opposition. The oppo-

sition which was noted by the Chair may come from sources that have their own agenda, perhaps.

I look at it from this standpoint, if I may articulate it to the Chair: The opposition cannot be based on any fear that if our bill should be passed that there would be less fair and impartial hearings or fewer hearings of a fair and impartial nature granted to employees.

If you just take that criterion alone, the opposition would have to melt in the face of it or at least acknowledge that ripping away the agency's power to control visibly or invisibly the outcome of proceedings is a good thing for all of us.

With that, I am willing to subject myself to questions or to leave with a good feeling that we have made our point.

Mr. McCLOSKEY. George, what would be the role of the MSPB be as far as the administration and direction of these Administrative Law Judges in the event that your legislation were enacted?

Mr. GEKAS. I believe the special cadre that is under the aegis of the Board now would continue in its administrative function. We would simply transfer the boss so to speak; not Ben, but the overall concept of which area—which agencies control what.

Mr. McCLOSKEY. I am sorry. Would you try that again?

Mr. GEKAS. What I am saying here is that the main purpose of our legislation, which does not control the structure as such of the Board but really divorces the judges that are serving under the Board from the salary considerations that would—that now obtain from the agencies which refer cases to the Board in the first place.

That is what I am talking about. So that the main aegis of the Board would not be changed.

Mr. McCLOSKEY. So there is still a significant administrative role in Mr. Erdreich?

Mr. GEKAS. That is correct. We want to protect the body of law, of cases, of precedents that have been set.

Mr. McCLOSKEY. We are going to hear from MSPB judges who are, I think in substance and spirit, very much in agreement with the basic policy of your legislation; but you have active knowledge of pressure being utilized in the essence of either particular outcome specifically or preferences for outcomes by MSPB administrators?

Mr. GEKAS. We have some anecdotal evidence of that over the years.

I must say to the Chairman that I personally have knowledge of such actions in the past before my present life as a Member of Congress started, back in Pennsylvania. It really impacted at one time on a case in which I was—one of my constituents or clients or both were involved at that time. But I think they would be able to fill you in, as they testify.

Mr. McCLOSKEY. Congressman, is there anything else you want to add?

Mr. GEKAS. Not a thing.

Mr. McCLOSKEY. I appreciate your testimony. Thank you for taking the time from your schedule to be here this morning.

Mr. GEKAS. Thank you very much.

Mr. McCLOSKEY. Mr. Erdreich, please proceed.

Mr. ERDREICH. Thank you, Mr. Chairman.

Mr. MCCLOSKEY. Welcome. Good to see you. Your full statement is accepted for the record. You may proceed as you like.

You want to introduce your associates?

STATEMENT OF BEN ERDREICH, CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD, ACCOMPANIED BY LLEWELLYN M. FISCHER, GENERAL COUNSEL, AND MARY L. JENNINGS, LEGISLATIVE COUNSEL

Mr. ERDREICH. I appreciate the comments by you as an introduction. It is a pleasure to be here. I congratulate you on your chairmanship. Being in this room is an honor in itself.

To my left is Lew Fischer, General Counsel of the MSPB, and to my right is Deputy General Counsel Mary Jennings.

As you know, I was confirmed by the Senate only about 30 days ago. I had to bring some folks with me with more expertise about the agency to help answer some of the questions you may have after I finish my statement.

I am going to abbreviate my full statement, it being part of the record.

I want to be sure you understand, Mr. Chairman, that I look forward to continuing to work with you toward the betterment of our Government for the hard-working members of the Federal work force.

The relationship between the integrity of our civil service system, the protection of rights within that system and the proper management practices within our Government cannot be overemphasized.

At the Board, these concerns take the shape of approximately 10,200 cases annually dealing with a range of subjects which come before the Board: whistleblower protection, prohibited personnel practices, discrimination, retirement benefits.

As we speak, Congress is looking at expanding that jurisdiction somewhat as to employees who may come before the Board.

In the short period of time that I have been there, I can say that I am extremely impressed with the high quality of professionalism and productivity of the staff, administrative judges, and administrative staff of the Board. In my first month, I have had a chance to meet with all the department heads, some of the regional employees, and administrative judges. I plan, of course, to visit our regional offices—we have 11 around the country.

Each component of the agency requires a meticulous, thoughtful and compassionate mind because we are, after all, making decisions that affect the lives and livelihoods of individuals.

As Chairman of the Merit Systems Protection Board, I serve as the chief executive officer of a $26 million, 300 employee-plus agency with, as I said, 11 regional offices.

I recently spoke to Vice President Gore about the ways that MSPB and personnel management agencies in general can implement the National Performance Review agenda being produced. I have also explored that with members of the NPR staff.

Just last week I asked my staff to give me a list of reports our agency is required to submit to the executive branch and to Congress. I was surprised to learn they are 66 in number, separate different reports, and that the staff hours, and salaries required to fill those reporting requirements are significant.

We all have much work ahead of us, it seems to me, in Congress and the executive branch. The reauthorization legislation will play an important part in reaching our goals.

As you consider the reauthorization of the Board, I thought I would touch on some of the highlights of where we are in achievements that I think the Board has accomplished in its fairly short period of time of being in existence—that is, since the 1978 act and 1979 beginning.

First of all, I would say let's look at the way we manage with reduced fiscal resources. This fiscal year our budget is $26 million. If you cast back in 1984 dollars, we were operating at about $21 million. Bringing that forward, that would be $35 million in today's dollars.

So we are performing our mission with reduced resources, resources that have been reduced over these years of operation. We have done that with efficient case management, modern computerized systems, and administrative controls.

Looking at the adjudication at the Board, the Board's caseload has increased on average of about 3 percent a year. Despite that caseload increase, the administrative judges continue to produce high quality decisions with an enviable record of case timeliness.

In fiscal year 1992, the judges averaged 79 days to issue decisions on appeals; and 97 percent were decided within our 120-day time standard. The average processing time for petitions at Board headquarters is now 128 days for the first three-quarters of the current fiscal year. It has been longer, but is down to that period of time.

Over the last several years, as the Chairman knows, Congress has expanded the Board's jurisdiction. The Postal Employee Appeal Rights Act of 1987, Whistleblower Protection Act of 1989, the Civil Service Due Process Amendments of 1990, all added cases—potential jurisdiction to the Board—and increased the caseload of the Board.

The Board has also engaged, Mr. Chairman, in a pioneering effort in alternative dispute resolution. We trained the administrative judges in alternative dispute resolution techniques, exploring settlement as part of the Board process. Of course, it is part of the process throughout our judicial system, but at the Board it is also part of how we go about trying to resolve disputes that employees have raised.

Currently, the settlement rate is right at 50 percent, and I am exploring the possibility of starting a similar program at the Board level of cases that have been appealed to the Board from the regional offices to see if that might also be a means to expedite and have the parties resolve cases on their own.

Implementing the Whistleblower Protection Act is a major concern of mine. I know it is also a concern of the Chairman and of Congress that it be adequately and fully implemented.

You are familiar with, I am sure, the October 1992, GAO report—General Accounting Service report—which reviewed whistleblower cases. It looked at some 565 cases closed by the Board over about a 2-year period.

The GAO determined that about one-third of the individuals who sought corrective action from the Board after the special counsel

closed their cases obtained relief through either settlements or reversals of adverse personnel actions. During the same period, about one-third of the individuals who filed their appeals directly with the Board also obtained relief.

I might add, Mr. Chairman, that the Board is, of course, reviewed by a primary reviewing court, the U.S. Court of Appeals for the Federal Circuit. In fiscal 1992, the Federal Circuit affirmed 90 percent of the cases from the Board that were appealed to that court. That court has consistently affirmed our decisions in the 90-percent range. So we are constantly looked at and, properly so, overseen, if you will, by that Federal court.

Beyond adjudication, Mr. Chairman, as you know, we are charged by statute to look at the civil service system and the merit systems throughout our Government, through merit systems studies as well as our OPM oversight mission. We are to look at these systems and suggest to the Congress and to the executive branch ways in which the systems can be improved. Some of our landmark reports on whistleblowers, sexual harassment, the glass ceiling, and other issues have been widely distributed, and I think have been clearly a stimulus for changes in statutory law as well as administrative practice.

In closing, Mr. Chairman, let me say that I believe that the Board's mission is one critical to any well-run civil system. Unlike some charges given to Federal agencies, the Board's mission is not temporary nor will it become obsolete. As the reauthorization process proceeds, I would be happy to provide you with whatever additional information you may require.

Again, let me say I appreciate you inviting me here today. I will be glad to answer the questions you may have. Thank you very much.

[The prepared statement of Mr. Erdreich follows:]

PREPARED STATEMENT OF BEN ERDREICH, CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD

Mr. Chairman and Members of the Subcommittee, it is a privilege to appear before you today. I was confirmed by the Senate and sworn in as Chairman of the U.S. Merit Systems Protection Board (MSPB) just one month ago, and I am pleased to have the opportunity to work closely with the Subcommittee at this early date. I look forward to continuing the efforts of the Congress towards the betterment of our Government for the American people and the hard-working members of the Federal workforce.

The relationship between the integrity of our civil service system, the protection of rights within that system, and proper management practices in our Government cannot be overemphasized. At the Board, these concerns take the shape of approximately 10,200 cases annually related to subjects including: whistleblower protection, prohibited personnel practices, gender or racial discrimination, and retirement benefits, to name just a few. As we speak, the Congress is considering adding additional categories of workers to those eligible to bring their complaints to the MSPB.

In the short period of time that I have been working at the Board, I must say that I am extremely impressed with the high quality of professionalism and productivity of the staff. In my first month as Chairman, I have met with every department head individually, I have met with regional employees visiting the Washington headquarters, and I have visited the Washington Regional Office of the Board. I am very impressed with the job that is being done, and I can assure you that each component of the agency requires a meticulous, thoughtful, and compassionate mind. We are, after all, making decisions that affect the lives and livelihoods of Americans.

As Chairman of the Merit Systems Protection Board, I serve as chief officer of a $26 million, 300 employee agency. There are 11 regional offices across the country.

I am keenly aware of the duty of the head of every agency, large or small, to find ways to be more productive and more efficient as appropriations shrink. I pledge to you that I will seek ways to achieve those goals, and I can share with you that I recently spoke to Vice President Gore about ways that the MSPB, and personnel management agencies in general, can implement his National Performance Review (NPR) agenda. I have also explored this with members of the NPR staff. I urge each of you to support the Vice President in his important efforts.

Just last week I asked one of my most senior managers for a list of the reports our agency is required to prepare and submit to the Congress or the Executive Branch each year. You will be surprised to learn that the number is 66, and the staff hours and salaries required to fulfill these reporting requirements is staggering. We all have much work ahead of us, in the Congress and the Executive Branch, and the reauthorization legislation will play an important part in reaching our goals.

As you consider the reauthorization of the Board, you may wish to review its significant achievements:

Managing With Reduced Fiscal Resources

Since it began operations in 1979, the Board has compiled an impressive record in both its adjudications and studies while carefully managing its limited fiscal resources. The Board's responsibilities and its caseload have increased significantly, but viewed in terms of constant 1984 dollars, it would take $35.6 million in the current fiscal year for the Board to have the purchasing power it had nine years ago. This fiscal year our budget is $26 million. Although the level of available resources, in inflation-adjusted terms, has declined, the Board has compensated through efficient case management and strong administrative controls.

Adjudication

MAINTAINING A RECORD FOR TIMELINESS

Since 1987, the Board's caseload has increased, on average, about 3 percent per year. Despite the increasing caseload, Board administrative judges continue to produce high quality decisions with an enviable record of case processing timeliness. In fiscal year 1992, the judges averaged 79 days to issue decisions on appeals, and 97 percent were decided within our 120-day time standard. The average processing time is down from 112 days in fiscal year 1984 and has ranged from 72 to 76 days over the past several years. At headquarters, the Board has reduced the number of pending cases substantially, from just over 1,000 at the beginning of fiscal year 1991 to about 580 at the end of fiscal year 1992, while continuing to process newly-received cases. The average processing time for petitions for review at headquarters is down from 220 days in fiscal year 1991 to 128 days for the first three quarters of the current fiscal year.

CONGRESSIONAL EXPANSION OF BOARD JURISDICTION

In 1987 the Postal Employee Appeal Rights Act gave non-preference eligible Postal Service supervisors and managers the right to appeal adverse actions to the Board. The Whistleblower Protection Act of 1989 broadened the range of personnel actions that a whistleblower can appeal to the Board. The Civil Service Due Process Amendments, enacted in 1990, extended appeal rights for adverse actions and performance-based actions to additional employees in the excepted service.

PIONEERING ALTERNATIVE DISPUTE RESOLUTION

The Board has trained its administrative judges in alternative dispute resolution techniques. Exploration of settlement possibilities with the parties is a standard feature of the appeals processing in the Board's 11 regional offices. The rate of settlement of cases that are not dismissed jumped from 6 percent in fiscal year 1984 to 50 percent in fiscal years 1991 and 1992. I am exploring the possibility of starting a similar program at headquarters in cases the parties appeal to the Board from the regional offices.

IMPLEMENTING THE WHISTLEBLOWER PROTECTION ACT

In October 1992, the General Accounting Office (GAO) issued its report, *Determining Whether Reprisal Occurred Remains Difficult,* which included a review of 565 whistleblower cases closed by the Board from July 9, 1989 through September 30, 1991. GAO determined that about one-third of the individuals who sought corrective

action from the Board after the Special Counsel closed their cases obtained relief through either settlements or reversals of adverse personnel actions. During the same period, about one-third of the individuals who filed their appeals directly with the Board also obtained relief.

BOARD DECISIONS UPHELD BY ITS PRIMARY REVIEWING COURT

In fiscal year 1992, the U.S. Court of Appeals for the Federal Circuit affirmed Board decisions in 90 percent of the cases it adjudicated. These figures are consistent with those from earlier years.

BOARD HAS DEVELOPED A CONSISTENT AND COHERENT BODY OF CASE LAW

Unlike decisions of its predecessor, the Civil Service Commission, the Board's decisions are precedential and are published. To ensure easy access to its decisions, the Board makes them available to a number of commercial publishers. All Board decisions (except short form dismissals and denials) since 1979 are published in West Publishing Company's *U.S. Merit Systems Protection Board Reporter* and are indexed. Other publishers of reference works and periodicals publish the text of significant Board decisions or summaries of those decisions. Various commercial enterprises have Board decisions available on-line or on CD–ROM. Board decisions are also available on-line in the Justice Department's JURIS database and Air Force's FLITE database.

Beyond Adjudication

MERIT SYSTEMS STUDIES AND OPM OVERSIGHT MISSION

The Board has issued landmark reports on sexual harassment and whistleblowing in the Federal Government. The reports on whistleblowing provided foundation information for enactment of the Whistleblower Protection Act in 1989. Two 1992 GAO reports acknowledged the important role the Board's reports played in the Congressional consideration of whistleblower protection legislation (*Whistleblower Protection: Survey of Federal Employees on Misconduct and Protection from Reprisal and Whistleblower Protection: Determining Whether Reprisal Occurred Remains Difficult*).

The Board issued the first study of sexual harassment in the Government in 1981, and a comprehensive update was issued in 1988. Both reports revealed that sexual harassment is a significant problem. A major finding of the second report was that little had changed since 1981. The 1988 sexual harassment report led to the establishment of written sexual harassment policies and training programs on preventing sexual harassment in many agencies.

Other studies—widely recognized as groundbreaking in providing fundamental information about the Federal workplace—cover such topical subjects as the "glass ceiling" as it affects women in the Federal Government, recruiting for Federal positions, employee turnover, and workforce quality.

Conclusion

In closing, Mr. Chairman, let me say that I believe the Board's mission is one that is critical to any well-run civil service system. Unlike some charges given to Federal agencies, the Board's mission is not temporary, nor will it become obsolete. As the reauthorization process for the Board proceeds I will be happy to provide the Subcommittee with whatever additional information you may require. Again, let me say that I appreciate your inviting me to appear before you today, and I will now be glad to answer any questions you or other members of the Subcommittee may have.

APPENDIX

Cases and Adjudication Process

APPELLATE JURISDICTION: CASE DECIDED

During fiscal years 1984 through 1992, the number of cases decided annually by the Board's administrative judges averaged 7,854, with a high of almost 8,400 in both fiscal years 1991 and 1992. Since 1986, the number of cases decided by the 3-member Board on petition for review each year averaged 1,548, with a high of almost 1,800 in fiscal year 1992. The figures from these years do not reflect the 11,000 appeals filed by fired air traffic controllers in 1981; these cases had worked their

way through the system by late 1983 at the regional office level and by 1985 at the Board review level.

The almost 8,400 decisions issued by the Board's administrative judges in fiscal year 1992 covered both appeals and related cases, such as motions for attorney fees and petitions for enforcement of a Board order. The 3-member Board issued a total of over 1,900 decisions, almost 1,800 on petitions for review and the remainder on such related issues as attorney fees and enforcement of Board orders. A small number of these Board decisions were in original jurisdiction cases, which include actions brought by the Special Counsel.

THE APPEALS PROCESS

Appeals are filed in one of the Board's 11 regional offices, depending on the geographic location of the employee filing the appeal. The appeal is assigned to an administrative judge, who issues an initial decision. Under the Board's established time standards, administrative judges are expected to issue an initial decision on an appeal within 120 days of its filing.

Either party, or, in some instances, the Director of OPM or the Special Counsel as an intervenor, has the right to ask the 3-member Board to review the administrative judge's initial decision. If neither party files a petition for review with the Board within 35 days, the initial decision becomes the final Board decision. If a petition for review is filed, the Board will issue a final decision. The Board's self-imposed time-standard for issuing a decision on a petition for review is 110 days. Most cases are decided within this time standard, but some especially complex cases require longer to process.

The Board's decision constitutes final administrative action, except in "mixed cases" (those that involve both an appealable action and a discrimination issue) where the employee may seek review by the Equal Employment Opportunity Commission. Employees adversely affected by a final decision or order of the Board—either an administrative judge's initial decision that has become final or a final decision issued by the Board—may seek review of the Board's decision in the U.S. Court of Appeals for the Federal Circuit, except in "mixed cases," where judicial review is in the appropriate U.S. district court. The only Federal agency that may appeal a Board decision to the U.S. Court of Appeals for the Federal Circuit is the Office of Personnel Management. The Director of OPM may seek judicial review only of a Board decision that has a substantial impact on a civil service law, rule, regulation, or policy.

ORIGINAL JURISDICTION: CASES DECIDED

The Board issued 16 decisions in original jurisdiction cases in fiscal year 1992. Five were in Hatch Act cases brought by the Special Counsel; two were on Special Counsel stay requests; one was on a proposed agency action against an administrative law judge; four were on requests to review an OPM regulation; and four were in attorney fee, enforcement, and other cases arising from Board decisions in original jurisdiction cases.

ORIGINAL JURISDICTION PROCEDURES

Original jurisdiction cases are filed at Board headquarters; there is no regional office processing. Corrective and disciplinary action complaints filed by the Special Counsel (including Hatch Act complaints) and proposed action by agencies against administrative law judges are assigned to the Board's Chief Administrative Law Judge who issues a recommended decision. The final decision is issued by the Board. Special Counsel stay requests and requests by an interested party for review of an OPM regulation are decided by the Board.

Final Board decisions in original jurisdiction cases are subject to judicial review in the U.S. Court of Appeals for the Federal Circuit, except for decisions in Hatch Act cases involving state or local government employees. Decisions in state/local Hatch Act cases are reviewable first in the appropriate U.S. district court and then in the regional courts of appeal.

WHISTLEBLOWER APPEALS

Prior to enactment of the Whistleblower Protection Act (WPA), cases involving reprisal of whistleblowing came to the Board as: (1) appeals of personnel actions within the Board's jurisdiction, in which the appellant raised the affirmative defense that the action was in reprisal for whistleblowing, and (2) prohibited personnel practice complaints filed by the Special Counsel. The WPA added a third avenue to the

Board by authorizing the individual right of action (IRA) appeal, which may be filed by an individual who has exhausted the procedures of the Office of Special Counsel. The WPA also provided a new right for appellants in whistleblower cases to request stays of challenged personnel actions.

WHISTLEBLOWER CASES DECIDED: DISPOSITION

In fiscal year 1992, the administrative judges issued 221 decision on IRA appeals, 97 rulings on stay requests, and 282 decisions on appeals of otherwise appealable actions. As noted above, only the first two categories represent *new* kinds of cases authorized by the WPA. The number of whistleblower appeals decided has increased each year since the WPA was enacted, as employees have become more familiar with their rights under the Act. The number of whistleblower stay requests and appeals of otherwise appealable actions decided in fiscal year 1992 were about the same as in fiscal year 1991, while the number of IRA appeals decided increased by almost 13 percent. Fiscal year 1991 saw a dramatic increase over fiscal year 1990—the Board's first full year of experience in deciding cases under the WPA—with the number of decisions on IRA appeals up 120 percent and the number of decisions on appeals of otherwise appealable actions up 69 percent. In each of the last two fiscal years, the IRA appeals constituted 3 percent of all appeals decided. As previously noted, about one third of the whistleblowers who come to the Board—with either an IRA or an otherwise appealable action—receive some relief.

Mr. MCCLOSKEY. Ben, as you know, we are going to get testimony this morning from the Government Accountability Project which does not paint the MSPB in a very favorable light. There are statements as to, in essence, near futility, management bias, figures. If you don't have them for the record yet, you will get them. They essentially say there is a kind of why-bother-anyway type critique.

What do you think generates that? Why would professional observers in the field feel that MSPB is just a management sop or whatever?

Mr. ERDREICH. I am concerned when I hear any testimony or comments like that, Mr. Chairman.

The Board, as you know, was created as the independent—underline independent—adjudicator. It is set with three separate Board members at staggered terms appointed by the President to provide independent adjudication. Looking at the cases—better than 8,000 or 9,000 come through, are initiated, or started through the process annually. You can look at various figures.

Some cases, of course, are dismissed because the parties are not properly before us, are not under the statute, and we don't have jurisdiction over them. Some folks would then say, gosh, we couldn't get relief; but the fact is those parties are not proper parties before this Board. Congress did not see fit to have those parties be before us.

Some cases where there is no relief are cases that go out on jurisdictional grounds, as I mentioned, or where the parties do not file their cases in a timely manner. Under our rules, we can waive timeliness if adequate reason is filed for that.

Mr. MCCLOSKEY. There were statements, in essence, particularly people dealing without lawyers perhaps, that technicalities being used to exclude further action, missing the deadline by a day or two. I think you are, in essence, commenting on that. Do you want to proceed on that?

Mr. ERDREICH. No question that we have rules of procedure that are not fixed in concrete as Federal rules of procedure may be.

We have provisions to waive rules for adequate cause shown. But in the interests of fairness to all the parties, we do insist that parties perform under the rules that are laid out by the Board.

Again, there are grounds for waiving if a party can show good cause for why they were late in filing their petition seeking relief on initial appeal.

Mr. MCCLOSKEY. You are concerned about the substance and appearance of equity on that, as far as your future administration?

Mr. ERDREICH. I certainly am.

One of the things I have started to review is the cause for denial of relief on a jurisdictional timeliness basis. I am going to look at that, I will assure the Chairman, to see if indeed we are too formalistic, if the initial creation of the agency has over the years turned into a more formalistic activity than it should be. If that has resulted in denying opportunities for individuals to be heard on the merits, I will see what I can do about it personally. I am reviewing that, Mr. Chairman.

Mr. MCCLOSKEY. As I understand it, the recent Federal Circuit decision, *Clark* v. *Department of the Army*, of July 1 seems to overturn the contributing factor test that was intended to prevent any personnel action in which an employee being a whistleblower would have been a contributing factor.

In effect, the decision said that if the agency can provide clear and convincing evidence that it would have taken a personnel action anyway, it, in essence, can stand.

I guess I could argue that either way in my mind. Do you officially or unofficially or your legal staff have a reaction to that, both as to equity and how it will affect your work?

Mr. ERDREICH. I hesitate to comment on it, Mr. Chairman. It clearly is an issue we are going to be adjudicating very soon in other cases.

I would say, though, that the statute is quite clear. Congress set up the standard of proof, and I would continue to look to the statute to guide me in the future decisions we might make. I would prefer not to comment on the case itself because, again, it is something we will be adjudicating very shortly. I hesitate to put myself on record.

I am concerned, again, that there is adequate and full hearing of matters that particularly deal with whistleblowers, and, in this instance, where the statutory standards are clear, it is important we follow those statutory standards.

Mr. MCCLOSKEY. We talked a little about this. It may have come up in your testimony. But I think you said that something like 97 percent of the cases get resolved within—more or less—within the 120-day deadline. You were saying there was something like 3 percent that go beyond that. I guess they may be particularly difficult cases. Can you comment on how they go beyond that? What are the longest pending unresolved cases you have?

I believe testimony later today will argue for a more firm deadline for all cases.

Mr. ERDREICH. Well, the deadlines we have, Mr. Chairman, are set by the Board both at the initial appeal level where the administrative judges take the cases originally and then, as they come to

Headquarters. There are 120 days at the administrative judge level, and then, an additional period of days at Headquarters.

Those are the standards we have set. They are not fixed statutorily. They are set in place to encourage rapid decision-making. But, however, that standard should be, of course, consistent with fairness in the process and adequacy of the hearing.

There are some cases, a small percent, that go beyond those standards that we set up. In fact, I know the Chairman's interest. When I first got on the Board 4 weeks ago I had my staff take a look at the oldest cases, get those on my desk immediately, and show me why we could not move those out.

Indeed, some of those are the most complicated cases. Some have been from one Board member to a second and to a third Board member on rewrite, and really are arguments going back and forth among three judges, while we try to resolve it.

Mr. MCCLOSKEY. Some of those are several years old, Ben?

Mr. ERDREICH. Yes, they are. But just a very few, Mr. Chairman.

I asked yesterday afternoon, because I knew you would be interested, what is the oldest case. The oldest case is a case, however, that, statistically, shouldn't be the oldest case. It is a case that was decided in 1985. The case was decided, but the party who prevailed, the individual involved, sought and filed a petition for enforcement some 5 years later, in 1990.

Now his case was resolved in 1985. But it went on our books, apparently, I was told yesterday afternoon, as a 1985 case even though its petition for enforcement is what triggered the reopening.

That is a fault in the statistics.

Mr. MCCLOSKEY. It has been there 3 years since 1990.

Mr. ERDREICH. We resolved our part in under a year's time, but it went on appeal to the Federal Circuit and was reversed and remanded.

As you can see, some cases can go beyond usual time frames. It has nothing to do in that particular case—in my view—with unnecessary delay at either the Board or administrative judge level. But those cases are few in number.

I am concerned about that, Mr. Chairman, because when we are dealing with individuals' livelihoods, affecting their jobs, retirement benefits, depending on the type case we have, I am concerned that we move as expeditiously as possible, again, without doing violence to due process and fairness of the hearing process.

Mr. MCCLOSKEY. Do you or your fine legal counsel here—I would note we both know you are new in the position—have any suggestions to improve the whistleblower protection process, particularly in the area of reprisal?

Mr. ERDREICH. Mary or Lew?

Mr. FISCHER. One of the major problems in this area, Mr. Chairman, is that the word isn't getting out to the whistleblowers about the procedures and how they can avail themselves of the remedies that are available to them. What is really needed is a better educational process.

Mr. MCCLOSKEY. There has been no comprehensive, Governmentwide statement and education process as I understand it from previous hearings with the OSC; is that not correct?

Mr. FISCHER. That is correct, Mr. Chairman. That may be one of the big failings, that word isn't getting out so people can take advantage of the whistleblower protections of the WPA.

Mr. MCCLOSKEY. I believe—am I right—the OSC said staff will correct that? Have they gone that far? We are going to get it corrected somehow.

Do you have any further observations on that, counselor?

Mr. FISCHER. Not beyond that, Mr. Chairman.

Mr. MCCLOSKEY. You think that would be the main thing then? Knowledge of rights rather than anything structural or procedural?

Mr. FISCHER. That is my impression, Mr. Chairman. I think the procedures are there. The mechanisms are in place. It really is a failure to get the word out to people that these remedies and mechanisms are available.

Mr. MCCLOSKEY. Mr. Chairman, one of the key issues looming through this hearing today is the status of your administrative judges. Mr. Gekas' testimony was taken. We will hear from the MSPB judges later this morning stating they do not have the independence and backing that they need for fair and impartial decisions and professional career security.

Do you and the agency have a strong opinion on that one way or the other?

Mr. ERDREICH. Mr. Chairman, when I went through my confirmation process in the Senate 4 weeks ago, that question was raised. I promised the Senate committee, as I promise the Chairman here today, that I have set in motion a review of the issue. I have not reached any conclusions yet on the issue.

I have started looking at it. There are unclear areas I want to explore—the comparison of MSPB administrative judges with other administrative judges in other Federal agencies, of which there are many. We are not the only agency with administrative judges and not Administrative Law Judges. There are other agencies served by such finders of fact or hearing officers.

Second, we were set up statutorily to be an independent board, with members appointed by the President, Mr. Chairman. So the independence factor seems to me to be unique to us and, through our administrative judges, we carry out that independent decision-making role.

Mr. MCCLOSKEY. May I ask counsel if in their experience the administrative judges get rated on the substance or philosophy of their individual decisions?

Mr. FISCHER. Not to my knowledge, Mr. Chairman. I don't think that that is taken into account at all. I think there is a conscious effort to keep distance between the administrative side—personnel issues—and matters that are involved in the decision-making.

Mr. MCCLOSKEY. Is there a formal evaluation mechanism for judges?

Mr. FISCHER. There is an evaluation system that is required for all Federal employees, but there isn't any account taken during that evaluation process of how a particular administrative judge decides a given case.

Mr. MCCLOSKEY. What are factors? I understand timeliness is a factor, particularly getting the work out.

Mr. FISCHER. Timeliness is a factor, although there is a certain amount of leeway and discretion on the part of the administrative judge in difficult or complicated kinds of cases involving complex issues to take additional time. There is adequate provision for that in the system.

Mr. ERDREICH. Mr. Chairman, I would say, with your permission, I would like to get back to the Chairman in 30, 60 days. You tell me the time frame. I want to review it myself and give you my best opinion on the issue. I think it is one we need to address. I would like to get back to you in writing.

Mr. MCCLOSKEY. I guess you say you are open on the issue?

Mr. ERDREICH. I am at this point, Mr. Chairman. Some of the concerns that I raised are obvious to me now. I have to look at it for 30, 60 days. I would like to communicate back to you and the subcommittee and tell you my views on that.

[The information referred to follows:]

ADDITIONAL COMMENTS OF MSPB CHAIRMAN BENJAMIN L. ERDREICH

STATUTORY LIMITS ACCOUNT FOR MOST MSPB CASE DISMISSALS

At the hearing, questions were raised about whether the Board dismisses too many appeals on overly technical grounds. The attached chart was developed, at my request, to explore this concern.

In fiscal year 1992, some 3,249 initials appeals were dismissed. Of those, 50 percent were dismissed for lack of jurisdiction. The Board has only that jurisdiction conferred on it by statute. In nearly all cases, whether jurisdiction exists is a clear cut question not subject top "technical" interpretation. Another 39 percent of the cases were either withdrawn by the employee, withdrawn without prejudice, or the action was cancelled by the agency. Only 11 percent were dismissed due to timeliness.

I recognize that in a few cases, particularly where the Board decides questions of first impression, some discretion may exist to give the statutes broader or narrower interpretations. In such cases it is appropriate to look to the purpose of the statute to determine how discretion should be exercised. I assure the Subcommittee that I will foster thoughtful consideration of the underlying Congressional policy in cases where discretion is involved. It appears to me, though, that in the great majority of cases, the Board's view of its jurisdiction is dictated by statute and not by technicalities.

FEW CASES ARE DISMISSED ON TIMELINESS GROUNDS

A second area of concern was whether the Board dismisses too many cases on timeliness grounds. Notably, as the chart indicates, only about 11 percent of dismissals are for untimeliness. This does not appear to be disproportionate or to indicate that there is a systemic problem with timeliness rules. I share and will continue to be mindful of the concern that timeliness requirements not be mechanistically applied in individual cases in a way that creates unfairness.

Next to jurisdictional dismissals, the largest category of initial appeals dismissed is 22 percent that are withdrawn by appellants. This, together with the other two categories—dismissals without prejudice that allow appellants to refile and actions cancelled by agencies—support the view that overly technical dismissals are not a systemic problem in Board adjudications.

PERCEPTIONS ABOUT RELIEF IN WHISTLEBLOWER CASES ARE BEING ADDRESSED

Another concern expressed at the hearing was the extent to which the Board has provided relief in Whistleblower Projection Act (WPA) cases. The Government Accountability Project (GAP) was of the view that there was only one successful whistleblower during Fiscal Year 1991. In my opening statement, I relied on the General Accounting Office finding that relief had been provided in about one-third of all WPA cases through the end of Fiscal Year 1991.

We are meeting with GAP representatives, as we did prior to the hearing, to better understand their concerns and how the differing WPA statistics were derived. I am confident that this will lead to increased understanding of how the WPA is working in practice.

MSPB IS GETTING THE WORD OUT ON WHISTLEBLOWER PROTECTIONS

The Subcommittee has expressed concern that employees are not aware of the whistleblower protections that are available to them. The Board will redouble its already extensive efforts to disseminate information on these protections.

The Board has distributed more than 50,000 copies of a booklet titled "Questions & Answers About Whistleblower Appeals" developed by Board staff. The booklet has been reprinted four times since it was first published in 1989. Many of the copies were distributed by Board staff members making personal outreach appearances around the country.

I have directed publication and distribution of an updated version of the booklet. I also have directed renewed Board efforts to encourage agencies to cooperate in advising employees of the rights and protections the WPA provides for whistleblowers.

CONSIDERATIONS CONCERNING H.R. 1889

The legislation proposes that Administrative Law Judges (ALJs) preside over all MSPB hearings of agency personnel actions. Under current practice, the hearings are presided over by Administrative Judges (AJs). The bill also proposes to convert the Administrative Judges to Administrative Law Judges. As a result of these changes, the MSPB officials covered by the legislation would be provided increased pay and status. The stated purpose of the legislation is to ensure the independence and impartiality of the presiding officials.

Several issues arise in my review of the legislation to date. These include the issue of the independence and impartiality of adjudicators at the MSPB the value of accountability in the adjudicatory process; and the cost of the proposed legislative change.

1. INDEPENDENCE AND IMPARTIALITY

The independence of the MSPB and its adjudicating process was created by Congress. The independence of the MSPB is statutorily mandated, and it is inviolate. Such independence resulted from the review conducted by Congress when it enacted the Civil Service Reform Act of 1978. The new law received broader bipartisan support, and established the MSPB as a "strong, and independent" adjudicatory body to serve as the "vigorous protector of the merit system." S. Rep. No. 969, 95th Cong. 2d Sess. 6–7 (1978). Indeed, the drafters of the law had found bias inherent in the Civil Service Commission which was both the manager and adjudicator for personnel decisions in the Executive Branch. H.R. Rep. No. 1403, 95th Cong. 2d Sess. 6 (1978).

As a result, the Congress established by statute a single independent agency to "hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board." The statute holds the Board responsible for creating the adjudicatory infrastructure to perform this core mission. Since 1978, the MSPB has fulfilled these responsibilities by maintaining a system in which initial appeals, other than original jurisdiction cases, are filed in MSPB regional offices. Originally, such cases were decided by "Hearing Officials," who, since 1986, have enjoyed the denomination of Administrative Judge. It is the independence of the MSPB which provides for the independent adjudication of the cases at the regional level pursuant to the statutory mission and functions required of the Board.

The introduction of the legislation suggests that under existing circumstances the Administrative Judges at the eleven regional MSPB offices are prevented from being impartial in their decisions. These are extremely serious challenges, if true, and must be taken seriously in evaluating the need for change. However, no information was presented to the Subcommittee that reflects the existence of such a pattern of control, influence, or bias requiring a change of the nature contained in the legislation. Furthermore, despite strong feelings about rates of dismissal or reversal, no testimony was presented to the Subcommittee, and no information has been provided to MSPB, by Federal employees or agency officials, to the effect that the Administrative Judges who have decided their cases lack independence or impartiality.

It may be useful to mention that this is not the first time that Congress has considered whether or not the presiding officials in cases brought under the Civil Service Reform Act of 1978 should be Administrative Law Judges. Indeed, during development of the legislation, this was discussed because of strong criticism related to the level of legal skills, knowledge of due process rights, and overall integrity of the appeals process at the Civil Service Commission. As discussed in the conference report, "many complaints were heard during consideration of the Civil Service Reform Act of a lack of confidence in the ability of many hearing officers."

The Congress responded by creating an independent adjudicatory agency, but did not believe that it was necessary to create a new league of Administrative Law Judges within the MSPB. In fact, Congress gave the Board discretion to hear cases itself, use ALJs or other Board employees. 5 U.S.C. 7701(b)(1). Nonetheless, on September 11, 1979, the MSPB responded on its own to create greater confidence in the adjudicatory skills and legal knowledge of its presiding officials by requiring:

> [P]ersons designated as hearing officers must be fully qualified attorneys who possess the degree of legal competence evidenced by admission to the bar.

To achieve this standard, the MSPB offered to assist each non-bar member attorney, or non-attorney, to achieve bar member status. It did so by allowing them to take leave without pay to enroll full time in law school (in many cases up to three or more years), to have flexible schedules if attending night classes, provided payment of tuition for courses related to Board functions, and upon completion of their legal training and certification provided each qualified employee with a new position as an attorney or hearing officer with the Board.[1]

2. ACCOUNTABILITY

The issue of the accountability and evaluation of the presiding officials has risen in the context of whether such performance appraisals, required of all Board employees, impinge on the substance of decisions by such officials. There has been no demonstration that such objective evaluations, applied to all Board employees who have been hired to fulfill the statutory mission of the Board, interfere with the substantive nature or outcome of any case.

The timely adjudication of appeals to the Board has always been a central concern of the Congress, appellants, and other constituencies of the Board. If the agency is to comply with the requirements for timely review of cases by presiding officials, then it must have the ability to supervise and evaluate in an objective manner. It is possible that alternative methods of evaluation may better suit the job that Administrative Judges are performing, but the goal of less accountability is inconsistent with the Board's statutory responsibility to fulfill the mission of adjudication as an independent agency. In addition, the legislative proposal for such independence appears at odds with the findings of the most recent government-wide study of Administrative Law Judges, and the use of evaluations and appraisals in other adjudicatory forums. The Administrative Conference of the United States (ACUS) recently evaluated the role government-wide of administrative adjudicators who are not Administrative Law Judges. ACUS concluded that in instances where Congress determines that Administrative Law Judges are needed, it is essential to provide for accountability and efficiency through performance requirements and appraisals. The ACUS study pointed out that such performance appraisals are used for certain state court judges, state Administrative Law Judges, magistrates in Federal district courts, and in some Federal courts. It does not appear that such evaluations have caused problems of either independence or impartiality in these other adjudicatory settings.

3. COST

The legislation raises questions of significant increases in cost. The bill would result in costs of over $3.2 million in the first three years. The Board would incur this substantial additional cost against an annual budget of approximately $25 million. The legislation provides no supplemental appropriation for the Board and requires conversion of all those adjudicating cases to the elevated status of Administrative Law Judge. The impact of this change would create a need to institute furloughs, a reduction in force, or shifting resources from other required agency functions.

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[1] At the time this program was initiated, there were a total of 102 hearing officers, 80 of whom either possessed a law degree or were in law school, and 65 of whom were already admitted to the bar. Individuals who were already in possession of a law degree, or were completing law school, were given fourteen months to become admitted to a bar. Individuals who were not law graduates or in law school were given up to twelve months to be admitted to a law school, and then were given up to five years to complete law school and be admitted to a bar. Twelve individuals successfully pursued the completion of law studies and/or admission to the bar. All twelve of these individuals formally became hearing officers upon bar admission. Four individuals successfully entered law school, graduated, and were admitted to a bar. Of the latter four, two are still Administrative Judges today, and a third became an attorney and is still employed at the MSPB Headquarters.

INITIAL APPEAL DISMISSAL CATEGORIES

[Fiscal year 1992]

Dismissal type	Number	Percentage
Jurisdiction	1,636	50
Withdrawn by appellant	699	22
Timeliness	373	11
W/O prejudice	299	9
Action cancelled by agency	242	8
Totals	3,249	100

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY BEN ERDREICH, CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD

Question 1. If the same percentage of people obtain relief through an individual right of action (IRA) as through an otherwise appealable action, it seems that IRAs are a better avenue since they are less time consuming and cheaper. Do you have an opinion on that?

Answer. IRAs are slightly more time consuming than otherwise appealable actions (OAAs). In FY 1992, the Board's average processing time for an initial decision in an IRA was 87 days, compared to 83 days for OAAs. Employees bringing IRAs are also required to seek relief from the Special Counsel before coming to the Board. The Special Counsel procedure may consume an additional 120 days.

The Board has no data that suggest any differences in cost to employees based on the type of action.

Question 2. One criticism of the MSPS is that in its role as an appellate body, it defers too much to agency-level determinations as the neutral fact-finding body. The problem is that the agency is also, in effect, the defendant in these cases, calling into question its neutrality as a factfinder. Do you view this as a problem, and if so, what can be done to change it?

Answer. Agency-level determinations are not given special deference. The Board provides *de novo* review of both factual and legal questions, and the burden is on the agency to persuade the Board that its determination meets the applicable statutory evidentiary standard. In one area—review of the appropriateness of an agency's penalty selection—the Board takes the agency's determination into account. *Douglas* v. *Veterans Administration,* 5 MSPR 280 (1981). Even in this context, the burden remains on the agency to persuade the Board the penalty is appropriate.

Concerns that the Board defers to agencies are likely based on one view or another of the statistics in Board cases. Statistics are easily misread. For example, focusing on the number of cases in which the Board reverses an agency action outright does not tell the whole story.

Overall, in FY 1992, appellants received some relief in 2,513 initial appeals decided—34 percent of the approximately 7,300 cases (380 reversed, 111 mitigated, and 2,022 settled).

Narrowing the focus to cases where agencies propose actions against employees based on conduct or performance (i.e., appeals of adverse actions, performance actions and denials of within-grade raises) reveals a picture even more favorable to employees.

In FY 1992, of the 2,573, conduct and performance appeals (65%) that were not dismissed for timeliness or jurisdiction, 1,685 (65%) were settled and 888 (35%) were adjudicated. When settlements are considered, the Board affirmed the agency action in 624 cases (24%) and provided some type of relief to the employee in 1,949 (76%).

Decisions that changed the original agency action occurred through: settlement (1,685 cases or 65%), reversal of the agency action (176 cases or 6%), or mitigation of the agency action (97 or 4%). (Percentages do not add to 100% due to rounding.) The chart that follows portrays this graphically.

OUTCOMES OF FY 1992 MSPB CONDUCT AND PERFORMANCE APPEALS NOT DISMISSED [1]

	Total	Percent
Mitigated agency action/other	97	4
Reversed agency action	167	6
Affirmed agency action	624	65

[1] These include the 2,573 adverse action, performance action, and denial of within-grade raise appeals that were not dismissed. Percentages do not add to 100% due to rounding.

In sum, the record demonstrates that the Board acts as an independent adjudicator of employee appeals.

Question 3. When do you anticipate issuing a decision on the case, *Thompson* v. *Department of Justice*?

Answer. Ms. Thompson's IRA appeal, which was dismissed on jurisdictional grounds by the administrative judge, is currently under active consideration by the board. Absent unforeseen developments in the deliberative process, decision should be issued in due course. As in any judicial process, there is a ban on ex parte communications.

Question 4. Mr. Broida stated in his testimony that the MSPB should be responsible for ensuring that its administrative judges not only encourage settlements that are technically adequate, but also that they ensure the parties agree to the settlement that is substantively fair. According to Mr. Broida, this would reduce the number of challenges to settlements that must be adjudicated. Approximately how many settlements did the board adjudicate last year? Do you agree with Mr. Broida assessment?

Answer. The Board's policy, which favors settlements that are "consistent with law, equity, and public policy," is designed to achieve a good balance between encouraging fair settlements and allowing the parties to control their own agreements. In FY 1992, there were 2,022 settlements of initial appeals. Only 50—or 2.5 percent—of those settlements were appeals to the Board for further review, and only 19, or less that 1 percent, were appealed to the U.S. Court of Appeals for the Federal Circuit.

The Board policy requires more than a technically accurate agreement. In every instance, the Board requires that the administrative judge determine: (1) the parties reached a settlement, (2) they understood the terms of the agreement, and (3) they agreed whether to enter the agreement into the record. If an agreement is made a part of the record, the Board will retain jurisdiction to ensure compliance with the agreement. If not, the administrative judge must advise the parties that the Board will not have enforcement authority.

Before a settlement agreement is accepted into the record, the Board requires the administrative judge to review the agreement to determine that it is lawful on its face and that it was freely entered into by the parties.

Question 5. In regard to the Postal Service's recent restructuring, what is the significance of the *Edward Brown* decision? Will similarly situated Postal employees be allowed relief based on this decision?

Answer. In *Edward L. Brown* v. *USPS*, the Board held only that, on the facts and circumstances of the case, it had jurisdiction. The case was remanded to the administrative judge to determine on the merits whether Mr. Brown is entitled to any relief.

The Office of Personnel Management has intervened in the Board proceedings in *Walter L. Roberts* v. *USPS*, a case involving issues similar to those in *Brown*. OPM may petition the Court of Appeals for the Federal Circuit for review of the Board's final decision in *Roberts*.

This procedure assures a full airing of the legal effect of the Postal Service restructuring. However, because the Board acts as a quasi-judicial body bound to decide each case on its record and merits, determination of whether or not similarly situated Postal employees would be entitled to relief must await consideration of the circumstances in each case.

Mr. MCCLOSKEY. Could you comment on the *Brown* decision I referred to earlier, similarly situated postal employees or other Federal employees be allowed relief based on that decision?

Mr. ERDREICH. That is clearly something we are going to be adjudicating. I hesitate to get into future adjudication. The opinion speaks for itself as to what we found in that instance. I think, most likely or clearly, the other employees similarly situated will fall within the ambit of that decision.

On the facts and law, we felt that that decision was clear. We rendered it. It still is in process, though, Mr. Chairman. There will

be much more litigation. It could go to the Federal circuit court and back for a full hearing on this issue.

I am not trying to avoid your inquiry, but I hesitate to get into it—to give you an opinion in advance of what is going to be future litigation.

Mr. MCCLOSKEY. Two witnesses today will suggest that the MSPB take a more proactive role in educating appellants about Board procedures, rights, et cetera. Do you agree with these statements? Do you think the MSPB could use more resources to implement such improvements?

Mr. ERDREICH. We definitely need more outreach. Just as the General Counsel mentioned on the Whistleblower Act itself we need to make more employees aware of the possibility of relief through this channel, this avenue of adjudication. I have no doubt that we could use additional resources to do that, Mr. Chairman; but regardless of attaining additional resources, I am going to try to embark on an outreach program of our own with our current resources to see if we can achieve that. I think it must be done.

Mr. MCCLOSKEY. Obviously, we are here to talk about reauthorization. Ben, I understand the Senate may be looking at three years. I think the Governmental Accountability Project is going to be up here in a minute to state all goodwill for you but basically saying that the MSPB is a disappointment and we should consider a permanent reauthorization. Can you comment on that?

Mr. ERDREICH. I really haven't seen GAP's testimony.

When I look at the adjudication process over the 10, 14, 15 years of the Board's existence, I wouldn't call it a disappointment, Mr. Chairman. Other agencies such as the NLRB, have permanent authorizations. So there are examples of other agencies having permanent authorization that are similar to ours.

I know before I became Chairman that the agency sent forward a request for permanent authorization that still is before this subcommittee.

I don't have a strong feeling about permanent authorization, having been in Congress and now on the other side of the table. Being reviewed by you, Mr. Chairman, and Congress every so many years is a good system.

On the other hand, being permanently authorized does not mean you are not overseen and reviewed. Agencies should be and shall be by the proper committees. I think that will continue.

Again, there are other agencies that have a permanent authorization. I don't think the permanency of the authorization means it is some sort of stamp of approval from the committee as a finality by any means. Oversight is ongoing and should be.

Mr. MCCLOSKEY. Returning to an area partially covered before, the GAP testimony, I just read one sentence:

From October 1st, 1992 until July 17, 1993, the MSPB heard 53 cases under the Whistleblower Protection Act. Of those, only three cases were decided in favor of the whistleblower on the merits, holding steady since fiscal 1991 an approximately 5 percent success rate under the most favorable legal standards in the U.S. Code for employee rights. This track record hardly inspires confidence.

Could you comment on that?

Mr. ERDREICH. I guess we just have to get figures and look at each other's figures a little better.

The GAO study I referred to, Mr. Chairman, of whistleblower cases from 1989 through 1991, showed that there were a third of those who had been turned down by the Special Counsel got some relief before the Board.

I am not getting into what it did or didn't do. That is a different domain, of course. A third of those cases that had gone to OSC first came to us and then got relief. To me, that speaks of a hard look and fair look at those individuals' complaints. Sixty two obtained relief. One hundred and eighty-five came to us; a third achieved relief.

In that same period of time, in the GAO study, there were also whistleblowers who were able to come to us directly—they didn't have to go to Special Counsel first. These were otherwise appealable actions. Again, some 380 of those individuals came to us. About a third achieved relief, 126.

As you look at cases overall, beyond whistleblower cases, that weren't dismissed or settled, cases that were adjudicated before us, Mr. Chairman, with a hearing, about 20 percent of the time, the agency action is reversed.

I guess you just have to come to some conclusion about the level of success rate in our adjudication system, period, whether in this administrative agency or whether in just civil court, a State court, a Federal court or a criminal matter or what and make comparisons.

I am not here this morning to say that this is a terrific record as far as the specific cases involving whistleblowers are concerned. Nor am I here to just make some conclusion about the results in whistleblower cases—whether there is improper or poor handling of those. I don't think I could reach any conclusion from the facts I have before me, Mr. Chairman.

I assure you I have a strong concern about the adequacy and the fairness of these cases in particular but not excluding other cases. I have a concern about whistleblowers from my years in Congress, Mr. Chairman.

I am going to make sure that the law is implemented to the full extent of its statutory terms and that fairness and adequacy of hearings for whistleblowers and other Federal employees is assured when they come before this agency.

Mr. MCCLOSKEY. Ben, there is other testimony and problems we have heard of previously. Basically, I think the congressional understanding was that there should be a reasonable belief standard for a whistleblower to have protections. Obviously, it hasn't quite gone that way or been interpreted that way in some circles. Could you comment on that?

Mr. ERDREICH. I think you got me on that one, Mr. Chairman. I will have to ask one of the counsel to comment on that. Lew? Mary? Do you want to comment on that?

Ms. JENNINGS. You are addressing the reasonable belief?

Mr. MCCLOSKEY. Right. A person entitled to whistleblower protection if they reasonably believe they were a whistleblower rather than being, ultimately, judicially defined or ascertained as such.

Ms. JENNINGS. Well, that is the statutory standard. Of course, it has to be established in the Board process. I don't think anyone at the Board has an argument with that. I suppose the argument must be over what a reasonable belief is.

Mr. MCCLOSKEY. Surely.

Ms. JENNINGS. There are a fair number of cases out there adjudicating questions of reasonable belief now. The law is developing. It seems to me that that statute has been applied.

Mr. MCCLOSKEY. You don't think there is a problem in that area then?

Ms. JENNINGS. I am not aware of a specific problem, no.

Mr. MCCLOSKEY. Maybe we can further discuss that at another hearing, meeting or informally. We are getting word that there are some problems in that area.

Ms. JENNINGS. We would be happy to discuss it.

Mr. MCCLOSKEY. Mr. Chairman, anything else you would like to add? I appreciate your testimony. Your colleagues have done very well today.

Mr. ERDREICH. No, Mr. Chairman. Thank you for your courtesy. We look forward to working with you in the future. At any time, you give me a call. We will chat some more.

Mr. MCCLOSKEY. Stick around for some of the further testimony. I have read some of it.

Mr. ERDREICH. I will let you take care of that, Mr. Chairman.

Mr. MCCLOSKEY. Thanks a lot. I appreciate it. Thank you.

Mr. ERDREICH. Thank you, Mr. Chairman.

Mr. MCCLOSKEY. Our next two-person panel is Robert Keener, President of the National Federation of Federal Employees, and Jeff Ruch, Legislative Counsel of the Government Accountability Project.

STATEMENT OF ROBERT KEENER, PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES, AND JEFF RUCH, LEGISLATIVE COUNSEL, GOVERNMENT ACCOUNTABILITY PROJECT

Mr. MCCLOSKEY. Let me just say good morning.

I have done this before. Your statements are accepted.

Hope you are having a great morning. Look forward to hearing from you.

Mr. KEENER. Mr. Chairman, on behalf of the National Federation of Federal Employees, I appreciate the opportunity to present our views on the reauthorization of the MSPB. NFFE is the oldest independent Federal employee union, represents approximately 150,000 workers and 53 Federal agencies across the country.

Since the enactment of the Civil Service Reform Act in 1978 and the creation of the Merit Systems Protection Board, legal rules and standards have played an important role in Federal personnel decisions.

The act and the Board's interpretation of it have devoted a sizeable body of law that now controls the direction of personnel actions and provides procedures for those actions brought before the Board. The Board's mission is to ensure that Federal workers are protected against abuses by agency management, that employee de-

cisions are in accordance with MSPB principles and that the work environment is kept free of prohibited personnel practice.

The Board should be the guardian of the Federal merit system. Unfortunately, this guardianship has not been as strong as it might be.

The Civil Service Reform Act eased the burden of proof for disciplining employees for unacceptable performance. It sought to ensure efficient government and fair administration of the law by guarding against the abuse of personnel authority.

Obviously, it is vital for employees to perceive an investigatory and adjudicatory system as fair, impartial and effective. The act established the Office of Special Counsel as the investigative body and MSPB as the adjudicatory body.

We are all well informed about the extensive problems with the Office of Special Counsel. Many Federal sector practitioners consider the office ineffective and some have even called for its abolishment.

The Merit Systems Protection Board is also in need of reform. The Board and its staff must ensure both the appearance as well as the reality of due process and impartiality. The record shows that appellants lose approximately 80 percent of all cases, with some regions reaching above 90 percent.

A significant disparity also exists between the rate of reversal and mitigation of disciplinary cases by arbitrators and those handled by the Board. NFFE is convinced that much of the disparity is due to the conservative bias of the political appointees of the Board.

The Board's presiding officials generally have reflected this conservatism. The Board exercises principal control through its power to review the decisions of its hearing officials. This right allows the Board to set rules, to develop precedents, and to ensure uniformity in decisions.

NFFE is hopeful that Chairman Erdreich will bring a more enlightened and balanced viewpoint to the Board. A close review of Board decisions reveals that the Board apparently views its mission to be that of correcting arbitrary management action rather than providing for due process.

Practitioner and writer Peter Broida, who will also testify today, has described well the predicament employees face when they appear before the Board facing removal for poor performance. I quote:

> When it comes to performance actions, the deference to the agency is almost complete. The agency defines actionable conduct and tenure of employees by its complete authority to establish performance standards.
>
> Once the standards have been set, the agency need only to submit substantial evidence, that is a minimal amount of evidence, to demonstrate that one standard has not been met. With that minimal showing, the selection of the penalty is at the complete discretion of the agency.
>
> The Board acts like an appellate court rather than a trial court. The problem is that in our judicial system, appellate courts defer to trial courts, because the law and the jurists are neutral.
>
> Agencies that define and judge misconduct and poor performance and then defend or prosecute their actions before the Board are not neutral; the institution to which deference is given has committed its resources to ensuring the decision to impose discipline, and once made it is supported and upheld.

In addition to the need to strengthen due process rights, we offer the following additional suggestions for improving the mission of the Board:

First, the Board must move away from its formality and its haste to dismiss cases due to technicalities, as the process is supposed to be one of informal adjudication. We also suggest that the Board exert greater effort to educate representatives and appellants concerning Board procedures and case law. The ability to get a fair hearing should not be dependent upon obtaining specialized counsel.

Second, hearing officials must be commended for their rapid turnaround of cases, appeals to the Board members can stagnate for years. Congress intended the Merit Systems Protection Board to render decisions expeditiously and in a reasonable time.

Third, the Board must encourage quality opinions with detailed factual and legal findings. This will help to improve the credibility of the Board.

Fourth, We encourage the Board to strengthen its discovery procedures. Hearing officials must provide reasoned dismissals of requested evidence or witnesses.

Fifth, we strongly approve of recent attempts to increase the rate of settlement. The Board must assure that all hearing officers, officials, clearly spell out the terms of the settlement to the parties and strongly enforce all of its provisions.

The National Federation of Federal Employees wishes success to the Chairman. I appreciate the opportunity to appear here today and will be happy to answer questions.

Thank you.

Mr. McCLOSKEY. Thank you very much.

[The prepared statement of Mr. Keener follows:]

PREPARED STATEMENT OF ROBERT KEENER, PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Mr. Chairman and Members of the Subcommittee, on behalf of the National Federation of Federal Employees (NFFE), I appreciate the opportunity to present our views on the reauthorization of the Merit Systems Protection Board (MSPB). The NFFE is the oldest independent federal employee union and represents approximately 150,000 workers in 53 federal agencies across the country.

Since the passage of the Civil Service Reform Act in 1978 and the creation of the MSPB, legal rules and standards have played an important role in federal personnel decisions. The Act and the Board's interpretation of it have created a sizable body of law that now controls the direction of personnel actions and provides procedures for those actions brought before the Board.

The Board's mission is to ensure that federal workers are protected against abuses by agency management, that employment decisions are in accordance with merit system principles, and that the work environment is kept free of prohibited personnel practices. The Board should be the guardian of the federal merit system. Unfortunately, this guardianship has not been as strong as it should be.

The Civil Service Reform Act eased the burden of proof for disciplining employees for unacceptable performance. It sought to ensure efficient government and fair administration of the laws by guarding against the abuse of personnel authority. Obviously, it is vital for employees to perceive an investigatory and adjudicatory system as fair, impartial, and effective. The Act established the Office of Special Counsel as the investigative body and the MSPB as the adjudicatory body.

We are all well informed about the extensive problems with the Office of Special Counsel. Many federal sector practitioners consider the office ineffective and some have called for its abolishment. The MSPB is also in need of reform. The Board and its staff must ensure both the appearance as well as the reality of due process and impartiality. The record shows that appellants lose approximately 80 percent of all cases, with some regions reaching above 90 percent.

A significant disparity also exists between the rate of reversal and mitigation of disciplinary cases by arbitrators and decisions made by the Board. NFFE is convinced that this disparity is due, in part, to the conservation bias of political appointees on the Board. The Board's presiding officials have generally reflected this conservatism. The Board exercises principal control through its power to review the decisions of its hearing officials. This right allows the Board to set rules, to develop precedents, and to insure uniformity in decisions. NFFE is hopeful that Chairman Erdreich will bring a more enlightened and balanced viewpoint to the Board.

A close review of Board decisions reveals that the Board apparently views its mission to be that of correcting arbitrary management action rather than providing for due process. Practitioner and writer Peter Broida described well the predicament employees face when they appear before the Board facing removal for poor performance.

When it comes to performance actions, the deference [to the agency] is almost complete. The agency defines the actionable conduct and the tenure of employees by its complete authority to establish performance standards. Once the standards have been set, the agency need only submit substantial evidence, that is a minimal amount of evidence, to demonstrate that one standard has not been met. With that minimal showing, the selection of the penalty is at the complete discretion of the agency. The Board acts like an appellate court rather than a trial court. The problem is that in our judicial system appellate courts defer to trial courts because the law and the jurists are neutral. Agencies that define and judge misconduct and poor performance and then defend (or prosecute) their actions before the Board are not neutral; the institution to which deference is given has committed its resources to ensuring the decision to impose discipline, once made, is supported and upheld.

In addition to strengthening due process rights, we offer the following additional suggestions for improving the mission of the Board:

1. The Board must move away from its formality and its haste to dismiss cases due to technicalities, as the process is supposed to be one of informal adjudication. We also suggest that the Board exert greater effort to educate representatives and appellants concerning Board procedures and case law. The ability to get a fair hearing should not be dependent upon obtaining specialized counsel.

2. Although hearing officials must be commended for their rapid turnaround of cases, appeals to the Board members can stagnate for years. Congress intended the MSPB to render decisions expeditiously and in a reasonable time (5 USC 7701 (1)(4)).

3. The Board must encourage quality opinions with detailed factual and legal findings. This will help to improve the credibility of the Board.

4. We encourage the Board to strengthen its discovery procedures. Hearing officials must provide reasoned dismissals.

5. We strongly approve of recent attempts to increase the rate of settlement. The Board must assure that hearing officials clearly spell out the terms of the settlement to the parties, and strongly enforce all of its provisions.

The NFFE sincerely wishes success to Chairman Erdreich. I appreciate the opportunity to appear today and will be happy to answer any questions.

Mr. MCCLOSKEY. Mr. Ruch, welcome to you.

Mr. RUCH. Mr. Chairman, Members, thank you.

My name is Jeff Ruch and I am the policy director of the Government Accountability Project. I am here this morning to argue why the Merit Systems Protection Board should not be permanently reauthorized. The Government Accountability Project has been in existence for 17 years and it is a whistleblower protection organization.

Mr. MCCLOSKEY. Mr. Ruch, might I say something?

As you know, your testimony has provided about as much of the dialogue as anything going at this committee so far, and I appreciate that. I would like to make a suggestion.

If you could summarize as much as you can without doing injustice to your testimony, but particularly for my help and edification. I am law trained, but not a practicing lawyer, and I have not had the chance yet to read some of the cases as such that you are talking about. I am interested in some of that burden of proof testi-

mony. When you get to that, if you could try to put it, I hate to say this having had a relatively good law degree, if you could put that a little more out in layman's terms, it might help me a lot. Because I had trouble, it is the only thing in your testimony I had trouble with, it is my error or deficiency, not yours. So please proceed.

Mr. RUCH. If you had trouble with it, it is probably our problem as well, Mr. Chairman.

The point I was trying to make is that while we represent people in the private sector, the bulk of our clients are in the public sector. Everyone from Star Wars' scientists to sailors in Bermuda, botanists from the Forest Service to attorneys from the RTC, EPA scientists unions to meat inspector unions. We sort of see it all.

And having led the campaign in 1989 for the enactment of the Whistleblower Protection Act, looking back four years later, what we are seeing is there has been a steady erosion of the protections enacted there. And the Merit Systems Protection Board has been in the center of it.

I wanted to comment first on sort of the track record, to kind of get rid of the statistical cloud that is going on. In terms of formally announced decisions by the Merit Systems Protection Board, what we have seen since 1989 is a steady decline.

In 1990, the first year after the act was enacted, there was something like a 31-percent success rate. The next year, it fell to 10 percent. This year, it is 5 percent. Those are in terms of announced decisions.

If you look at the overall results, a much higher percentage of cases are settled prior to announced decision, and all that means is that about a third of the people don't lose outright on the merits. Because the settlements themselves are sealed, we have no idea what sort of relief people got. And based upon our experience, sometimes settlements are motivated from the fact employees run out of money or the case shouldn't have reached that point anyway and the agency has given up.

It is hard to make conclusions based upon these sort of overall statistics. But when you look at the individual cases, what you see are—these are cases that are supposedly decided on the merits. But the merits are increasingly derailed by technicalities.

You find cases being thrown out on jurisdictional grounds or even in cases where the employee prevails, they are not allowed a recovery because of some interpretation of the act. And the way we see the bottom line is that in discussing this issue with public employee unions and with private practicers, they advise their members and their clients, "Stay away from the Merit Systems Protection Board; use other avenues, if at all possible."

And the bottom line, from our point of view, and it has been verified repeatedly, even this spring by the General Accounting Office, the Whistleblower Protection Act is not working. Federal employees that we see on a daily basis continue to risk professional suicide by coming forward to report waste, fraud or abuse.

I think about the most generous thing you could say is if the Merit Systems Protection Board is not part of the problem, it thus far has not been part of the solution, either. We have three very

simple recommendations that the Board could adopt right now that is not—that are not based in the intricacies of the decisional law.

Three policies that they could institute tomorrow that we think would go a long way. The first has to do with employee stays.

One of the major reforms of this act in 1989 was to let employees who are facing the threat of a termination or long suspension to go to the Merit Systems Protection Board directly and say: Please freeze this in place until we can get to the bottom of this. The Board has routinely denied employee stays.

By contrast, the rare times the Office of Special Counsel has requested a stay, they are routinely granted. If the Board could alter its policy and the way it handles these stays, it would be an extremely significant development, because these cases oftentimes, at the point where someone's just about to be fired, are the most controversial and the most important for the morale of the agency work force. It sends a very, very powerful message.

If they are looking for ways to educate the public work force as to what is going on, it is to intervene in these cases at the time when they are most important. Also, in terms of the employee himself, and not so minor, is the fact that you don't lose your salary, you are not—your whole life isn't disrupted. You don't have to wait out in limbo for 2 or 3 years while your case is being adjudicated.

Our second suggestion is try and make agencies accountable. Currently, before an action is taken, there has to be some sort of intra-agency review. The Board exercises no quality control on that intra-agency review. So often the same manager that is ordering the termination is the same person that is reviewing the determination.

If the Board would hold the agency's feet to the fire and force them to do a fair, good-faith internal review, we would have fewer cases that got to the Board. And it would also send a fairly pointed message to the agencies themselves.

Third, has to do with discovery. Agencies regularly refuse to produce requested documents or witnesses in MSPB cases. And that means, in essence, they can simply stall.

[The prepared statement of Mr. Ruch follows:]

PREPARED STATEMENT OF JEFF RUCH, LEGISLATIVE COUNSEL, GOVERNMENT ACCOUNTABILITY PROJECT

Mister Chairman. Thank you for inviting the testimony of the Government Accountability Project ("GAP") on the Whistleblower Protection Act ("WPA" or "Act"), and the performance of the Merit Systems protection Board ("MSPB" or "Board"). My name is Jeffrey Ruch and I serve as GAP's policy director. Thomas Devine is GAP's legal director. This testimony would not have been possible without the legal research and drafting assistance of Jim Sugarman and Carey Huffman, two full time legal interns.

GAP is a non-profit, non-partisan public interest organization. Since 1979 we have actively monitored how effectively civil service reform laws protect freedom of dissent in the executive branch. From 1985–89 we led the constituency campaign for passage of the Whistleblower Protection Act. Today's testimony updates analysis that Tom and I presented in March to this subcommittee.

In overview we want to join those welcoming new Board Chairman Ben Erdreich. His arrival is long overdue. For the first time in 15 years, federal employees may have genuine reasons to believe that merit system principles will jump from paper rights to reality. Based on Mr. Erdreich's track record as a attorney and congressman, his expressed philosophy to date and our respect for his staff, we at GAP have high hopes that the MSPB will evolve into a respected administrative law forum.

High hopes alone, however, are no basis to grant the MSPB a permanent authorization. Mr. Erdreich faces an extremely difficult challenge to reverse an ingrained tradition of almost undisguised hostility to employee rights. Since its 1978 creation, the MSPB systematically has undermined the merit system in general, and whistleblower protection in particular. Since the Board's creation, fear of retaliation has more than doubled as a reason would-be whistleblowers remain silent. In short the MSPB has a lot to start proving. Until the Board passes those tests, it would be imprudent to remove the MSPB sunset provision that has existed since passage of the Civil Service Reform Act.

After 17 years of serving whistleblowers, GAP believes that they are the great untapped source of deficit reduction. We are not alone in that belief. Repeatedly Congress has unanimously passed whistleblower statutes, an almost unprecedented mandate of support. Former Chair Patricia Schroeder of this Subcommittee properly said the Whistleblower Protection Act should be titled the Taxpayer Protection Act. Federal Workers have exposed literally billions of dollars in wasted money and may have prevented even more. It has also been our experience that untold money is saved merely by the threat that employees with free speech rights potentially will expose corruption.

Unfortunately, the MSPB has not honored the mandate of the Whistleblower Protection Act. It is enforcing neither the letter nor the spirit of the law. The Act's goal as expressed in its "findings and purposes" section is to "strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government." The Board's failure to promote any of those goals is beyond credible debate, based on a review of its track record.

IMBALANCED TRACK RECORD

Before passage of the 1989 Act, whistleblowers only had won four decisions on the merits out of some 2,000 cases. In response, Congress overhauled the legal burdens of proof so significantly that Reagan Administration officials said it would be impossible to fire any self-described whistleblower, no matter how incompetent, and make it stick. There was no need to worry. Whistleblowers still do not have a fair chance to win even in the crudest cases of reprisal.

During the first year after passage of the Whistleblower Protection Act, approximately 31 per cent of complainants won their cases in decisions on the merits, according to FOIA responses. The second year that percentage had dropped to 10.5 per cent. There was only one successful whistleblower during the 1991 fiscal year, two during the 1992 fiscal year and one more prior to this hearing. From October 1, 1991 until July 17, 1993 the MSPB heard 53 cases under the Whistleblower Protection Act. Of those, only three were decided in favor of the whistleblower on the merits—holding steady since fiscal 1991 at approximately a five percent success rate under the most favorable legal standards in the U.S. Code for employee rights. This track record hardly inspires confidence.

In reviewing decisions on the merits, two trends stand out. First, when Congress enacted sympathetic ground rules for proving causal links between whistleblowing and alleged retaliation, the Board reacted by shrinking the definition of protected whistleblowing speech. Instead of merely demonstrating a reasonable belief disclosure of wrongdoing, functionally a whistleblower must earn vindication to receive the Act's protection. That usually is impossible, since it often takes years of government investigations and congressional oversight to resolve charges of serious wrongdoing. This emerging doctrine also frustrates congressional intent. The policy goal behind protecting whistleblowers is to insure their freedom to introduce controversial issues that shouldn't be secret, even if the dissenter's reasonable belief ultimately is mistaken. As demonstrated below, the Board also has shrunk the definition of protected whistleblowing through time and context restrictions.

Second, the Board has frustrated the new Individual Right of Action ("IRA") opportunity for employees to seek stays of alleged retaliation. Few WPA provisions are more significant for nipping coverups in the bud and reducing the chilling effect. Stays break through the wall of isolation and melt the chill because interim relief—(1) sends a powerful message to other employees, (2) reduces hardship by allowing the complainant to defend his or her career while on the job instead of out on the streets, and (3) helps maintain the whistleblower's access to information and contact with witnesses, which is crucial, while charges of policy misconduct are under investigation.

Formerly the Office of Special Counsel had a monopoly on the right to seek a stay. Although the Board routinely granted OSC requests, the Special Counsel almost never sought them. The 1989 Act broke the OSC's monopoly on seeking stays, and Congress spelled out its intent in legislative history that the Board use this new

authority liberally. Unfortunately, for all practical purposes nothing has changed. Because the track record of successful employee stay petitions is so unfavorable, GAP advises intakes and attorneys that filing for temporary relief realistically means asking for the first strike *against* their rights. This is an area where Mr. Erdreich's leadership could have an immediate, highly visible impact, affecting a significant number of cases and restoring confidence in the Board.

ERODED BURDEN OF PROOF

The most significant threat to the Act has come from the Federal Circuit, not the Board. In *Clark* v. *Department of the Army,* No. 92–3296 (slip op. July 1, 1993), the Federal Circuit functionally erased the WPA's revised legal burdens of proof. The Federal Circuit gutted the Act through a neat maneuver: an agency automatically defeats the reprisal defense by supporting a proposed personnel action the way it has to anyway. More technically, under *Clark* an agency defeats an employee's *prime facie case*—that whistleblowing was a contributing factor to a challenged personnel action—by meeting the government's preexisting burden to prove the merits of its own misconduct charges against the employee.

Besides mixing reprisal apples and merits oranges, if upheld this precedent will cancel the whistleblowing affirmative defense. Any agency already must prove the merits of its charges under 5 USC 7701(c), whether or not there is whistleblower retaliation. Under *Clark,* when an agency meets the initial burden it also gets credit for defeating the nexus element in the whistleblower defense, and the case is over.

Clark also literally erases the agency's reversed burden after a *prima facie* case is established, providing by clear and convincing evidence that it would have taken the same action on grounds independent from whistleblowing. As a rule, agencies meet that burden by proving a necessity to act based on the merits of charges in a termination or other proposal. But once whistleblowing has been established as a contributing factor, the agency must meet the higher standards of clear and convincing evidence.

To summarize, *Clark* leaves the Whistleblower Protection Act irrelevant. A *prima facie* case is defeated merely by successfully defending the grounds for a proposed personnel action under the same standards in section 7701(c) that exist whether or not there is an affirmative defense. It is not even necessary to check for a link between Whistleblower and the challenged personnel action, which can be upheld based on its own merits. *Clark* flatly defeats the repeatedly-expressed legislative history that protected whistleblower may not play any factor in personnel actions, and that if those factors do, an agency must satisfy an extraordinary burden of proving it would have taken the same action even if the employee had remained silent.

The solution must be legislated to maintain any viability for the 1989 Act. Congress must remove any option for the Board to reject reprisal claims merely because any agency supports its misconduct charges with a preponderance of the evidence, or its performance charges with substantial evidence. Congress can accomplish this goal simply, by adding the following language after the opening jurisdictional clause in 5 USC section 1214(b)(4)(B)(i) and 1221(e)(1): "notwithstanding the provisions of sections 7701(c)(1) of this title,". Through that amendment, an agency's defense against a reprisal defense will have to be *additive* to its underlying support for a proposed action.

SHRINKING JURISDICTION

Increasingly, whistleblowers have been locked out of Board proceedings on jurisdictional grounds, without ever receiving a forum for their reprisal claims. To illustrate, the Board has ruled that statements made in a grievance report or discrimination complaint are not covered as protected disclosure. This loophole has been manufactured by the Board despite the Act's clear textual commitment to protecting "any disclosure of information." see, *Fisher* v. *Department of Defense,* 52 M.S.P.R. 470 (1992); *Padilla* v. *Department of the Air Force,* 55 M.S.P.R. 540 (1992). Congress unequivocally declared the forum and context are irrelevant; all that matters is the substance of whistleblowing. Nevertheless, the Board disqualifies federal employees from raising issues of concern to the taxpaying public, such as fraud and waste, simply because the employee has chosen to do it in the context of a grievance. In GAP's experience, many employees do not even raise personnel concerns in a grievance. They employ that channel to blow the whistle through the chain of command about an agency's performance in carrying out its mission.

The Board also has prevented employees from raising other prohibited personnel practices when challenging whistleblower retaliation in an Individual Right of Action. see, *Marren* v. *Department of Justice,* 51 M.S.P.R. 532 (1991). This means that depending on how an employee was wronged, s/he will have to bring several dif-

ferent actions for each legal challenge to the same incident. Given the number of federal employees and claims filed annually it is hard to see how such a ruling would serve the interests of any parties or the system.

Several problems with the Board have remained unresolved, even after congressional pressure. Since 1992 the Board has not decided *Thompson* v. *Department of Justice,* (MSPB Docket No. DE1221920182W1). Here the administrative judge excluded a Justice Department employee from Whistleblower Protection Act coverage by designating her as a confidential policy-maker, exempted under 5 U.S.C. 2302 (a)(2)(B), a year after her termination and just before a scheduled MSPB hearing under the Act. Last year key members of Congress, including this subcommittee's former chair, submitted an *amicus curiae* brief to the Board on this still-pending case.

CREATING AGENCY ACCOUNTABILITY

Much time-consuming, draining litigation could be avoided if agencies were more careful in reviewing personnel proposals before taking final agency action. Unfortunately this seldom occurs, because agencies correctly perceive they face no accountability. The Board and the Federal Circuit almost never require an agency to follow the well-recognized rules for a good faith, conscientious intra-agency review before finalizing a manager's proposal.

The Federal Circuit has ruled that no limitations exist on *ex parte* contact between the proposing official and the deciding official when considering adverse personnel actions. In fact they may be the same person, according to *DeSarno* v. *Department of Commerce,* 761 F.2d 657 (Fed. Cir. 1985). The officials may also finalize the action before the required 7 day reply period without fear of their decision being automatically reversed. *Baracco* v. *Department of Transportation.* 15 MSPR 112 (1983), *aff'd,* 735 F.2d 488 (Fed. Cir. 1984). Taken together, these decisions deny federal employees any genuine chance at stopping an illegitimate personnel practice before it is finalized, leaving them with the choice of accepting their fate or incurring significantly higher expenses and frustration fighting the decision.

RESTORING DUE PROCESS

The Board has little credibility with the practicing bar, because for all practical purposes it has no pattern of enforcing even the principles behind discovery rules in the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Agencies regularly refuse to produce requested documents or deposition witnesses, because they know they can with impunity. Through fact pleading, the Board even requires whistleblowers to prove their protected activity status as a precondition to begin discovery. Normally discovery is a vehicle to develop that evidence.

MSPB factfinders should be elevated to Administrative Law Judges under 5 USC 3105, with corresponding increases in qualifications requirements. Currently, Board decisions are adjudicated by officials in the hybrid status of "Administrative Judge," which institutionalizes the Board as a second class forum for resolving merit system disputes. The reduced status also deprives MSPB adjudicators of potential for judicial independence under the Administrative Law Judges Corps Act passed last session by the House Judiciary Committee. This recommendation is particularly important if Congress locks in permanent authorization for the Board. At a minimum the Board's factfinders should have credentials and stature comparable to those normally found in the administrative law system.

STANDARDIZE PROVISIONS FOR MAKING THE EMPLOYEE WHOLE

Currently the U.S. Court of Appeals for the District of Columbia and for the Federal Circuit are in conflict over whether employees may receive back pay for periods of indefinite suspension. *See, Brown* v. *Department of Justice,* 715 F.2d 662 (D.C. Cir. 1983); *Wiemers* v. *Merit Systems Protection Board,* 792 F.2d 1113 (Fed. Cir. 1986). While the D.C. Circuit allows back pay, the Federal Circuit denies it. However, the Federal Circuit feels bound by precedent calling the practice harsh. It has even suggested in an opinion that Congress change the law. ("Perhaps Congress will consider the problem and decide to remedy the situation to permit the award of back pay to employees in that position for the period of their suspension." *Jones* v. *Dep't of Navy,* 978 F.2d 1223, 1227 (Fed. Cir. 1992)). Congress should use the opportunity of reauthorization to clarify the law and eliminate further time consuming litigation. It can do so merely by adding the language "is reinstated after a suspension" to the list of justifications to grant back pay in 5 USC 5596(b)(1).

ATTORNEY FEES

Currently, only attorneys may be awarded fees for representing complainants before the M.S.P.B. *See Horton* v. *USPS,* 7 MSPR 232 (1981). This discourages complainants from hiring non-attorney representatives who are usually much less costly and often as well qualified due to specializing in the field. *Pro se* litigants are also prevented from receiving fee awards, (*Naekel* v. *Department of Transportation, FAA,* 845 F.2d 976 (Fed. Cir. 1988)), even after spending considerable effort and resources defending themselves against a firing or promotion which turns out to be illegitimate—time they could have spent seeking new employment or getting paid at a new job.

The MSPB continues to raise hair-splitting distinctions on award of costs to prevailing employees, such as who made a long distance call and the difference between copying charges and telephone charges. None of this matters to the whistleblower, who must pay all those bills to have any chance of winning. The Board should provide for recovery of any reasonable direct or indirect out-of-pocket expenses incurred by employees who prevail. This provision was included in S. 2853, which passed the Senate last session.

The Board should also provide for recovery of attorney fees and costs in a pending MSPB when an employee substantially obtains the relief available from a Board order, even if the remedy arguably was obtained for reasons independent of the litigation. Currently, the Board and Federal Circuit have rejected payments of fees when an agency asserts that its total surrender had nothing to do with an imminent Whistleblower Protection Act claim, even when the relief is institutionalized in an MSPB settlement and at most was a result of the whistleblower's identical disclosures outside the litigation. To effectively present their case, whistleblowers frequently are forced to seek help from Congress and speak out in the media about misconduct being covered up. But under the current doctrine, if they are successful they effectively waive their right to legal fees during pending litigation. In one instance that left a successful whistleblower with an $80,000 legal fee. The bottom line is that under present case law, the most effective whistleblowers may not be able to afford to win.

CONCLUSION

We at the Government Accountability Project would be honored to work with the Chairman of this Subcommittee and his staff to address the problems that entail statutory changes. We are genuinely excited about the new leadership at the Merit Systems Protection Board and look forward to a change in direction.

While we are optimistic, we are also skeptical. We have seen new appointees continue the same policies of their predecessors despite initial declarations of change. The proof will be in the pudding. Like anyone else, Mr. Erdreich should have to take the test before he gets credit for passing it. The Board has not yet earned permanent authorization. We hope that Congress will not let the sun set on accountability for this critical agency.

Mr. MCCLOSKEY. Has this happened with MSPB requests?

Mr. RUCH. Not with MSPB requests. These are employees' requests to produce documents that are made before an administrative judge and they are not enforced. And to sort of compound that problem, we often have cases where the employee is asked by the administrative judge in fact pleadings, to basically demonstrate his case before allowing discovery. That is like telling someone to go build a house before they will be issued hammers and nails.

By enforcing discovery, you can empower the employee to not only prove their case but to call the agency's bluff, to demonstrate what it is that he is blowing the whistle about, and your rate of settlement will go up.

Mr. MCCLOSKEY. What is the legal status of the MSPB now to enforce discovery? I am sure you are getting to that. Just a matter of their discretion.

Mr. RUCH. It is a matter of their discretion. It is a matter that is addressed statutorily in the Senate bill. They would like in the Senate bill, the last session, is try to take some discretion out and

try to make them more closely comport to Federal Rules of Civil Procedure.

Even if these steps are taken, we would argue that a reauthorization should not be permanent. It should be periodic or temporary, so that Congress can revisit the areas that have been eroded by Board interpretation. This will get into the areas of things like burden of proof.

One area of particular concern to us is the fact that the Board does not appear to respect the role of non-attorneys. No fees are allowed for a non-attorney representative of an employee. And an employee, whether with an attorney or representing himself, is not allowed any recovery for the cost of doing the investigation or proving his case. And the message that is received there is the MSPB is a forum that requires an attorney.

If you don't hire an attorney, stay home. The Board has interpreted the law in such a way that they say they have no alternative. And it seemed to me, this is one of the areas where Congress, if it feels differently, should step in and clarify the law.

Mr. MCCLOSKEY. Mr. Ruch, what's the situation with other agencies and equivalent procedures as far as recovery of attorneys' fees and when it goes for the employee?

Mr. RUCH. As far as the attorneys' fees, there is no controversy about recovering the fees of an attorney. Most other administrative bodies are much better——

Mr. MCCLOSKEY. You are saying when they hire an advisor or arbitrator or overall expenses?

Mr. RUCH. A non-attorney representative, or even if they have an attorney, many times by the time the whistleblower gets an attorney, they have spent a massive amount of time assembling the case. And in some cases, they don't hire an attorney until very late in the Board process.

All the direct out-of-pocket expenses incurred by the person himself are not eligible for recovery. And that is another area that is being addressed in the Senate bill.

A second area has to do with the sort of array of jurisdictional barriers that has been imposed by the Board. Probably the easiest way to summarize all this is the Board will not recognize a whistleblowing disclosure if it is raised in the context of a grievance, a discrimination complaint, or the exercise of an appeal right.

Everything is sort of divided into boxes and they are never allowed to merge, even though life isn't divided into boxes. Employees who are raising problems do so in the only way that makes sense to them, and most often that is in the context of a grievance, because you don't need a lawyer to file a grievance, you can just file a grievance. But once you started the grievance route, you are sort of confined to it.

It was our understanding the Merit Systems Protection Board was not to place precedence in form over substance. It is entirely within the Board's discretion, we think, but they have now sort of—their position has been ossified by repeated case law, to allow whistle blowing in any context. And we think that one of the areas Congress should think about is simplifying how these matters are raised.

Third, there have been a whole variety of what we call interpretive retreats on issues like burden of proof, what constitutes a reasonable belief, even who is eligible. There is a case pending before the Board in which a number of Members of the House are on an amicus curiae brief in which an employee was retroactively classified a confidential employee and thus outside of the Whistleblower Protection Act. And even in cases where people prevail, it is not clear, for example, in a case of an indefinite suspension, whether you are entitled to receive back pay.

To go back for a second to enlarge on the burden of proof issue, one of the key reforms of the Whistleblower Protection Act was to reform the burden of proof so that all the employee had to show was that his protected disclosure was a circumstance that was relevant to the action. And once he meets that relatively minor burden, the burden then shifts to the employer to demonstrate by a higher standard, clear and convincing proof that there is an independent basis for taking the action. The court decision said that the employer evidence that is used to establish his burden can be used to prevent the employee from even meeting the minimal burden. And so it is one of these things where the court sort of took everything and kind of mixed it up altogether and used sort of a preponderate standard.

The reason—the policy reason behind having this contributing factor test, and why it was such an important reform, is that prior to that, the employee had to prove the employer's motivation, that the employer was acting sort of out of malice. And that type of information is generally outside of the employee's control. And so to show that it was certainly a circumstance that was relevant, is enough to trigger the larger step.

And reflecting back to the suggestion on stays, if employees who are making plausible cases can get these matters stayed so that they are not out on the street while the matter is investigated further, that really does go a long way. We think that Congress should periodically revisit the Board in a legislative rather than just an oversight context, and we think it is important to—it is the only way to keep congressional intent alive in the act. We don't think it is an academic, legal or legislative exercise.

Mr. MCCLOSKEY. What your suggested language would be for burden of proof, you know, for legislation?

Mr. RUCH. To the extent the Board—in the case of the Clark, that was an appellate court decision that allowed the Board to go that far. And to the extent the Board decided to go that far, it was a matter for legislation, then it seemed to me, you would want to clarify the burden of proof and point out that the employer evidence couldn't be used to disable the employee in meeting, the initial minimal burden.

Mr. MCCLOSKEY. I am going to need further work with you on this; OK?

Mr. RUCH. OK. And that part of—I should confess, that part of the testimony was rewritten about four times.

Mr. MCCLOSKEY. I am having a little trouble visualizing exactly. How is the employer, in essence, burden, which they try to make, used to keep the employee if he establishes the burden is on the employer; right?

Mr. RUCH. To put it in sort of graphic terms——

Mr. MCCLOSKEY. Could you pragmatically state how that would occur with *x* issue?

Mr. RUCH. If an employee is alleging that 2 weeks after contacting the Inspector General, he receives a notice for proposed termination, and the employer's counter is that they are in the process of a reorganization, the reason for the termination is that they are reorganizing, under the way we view the law, the employee has met his burden in showing that if the employer was aware of the IG report, that it is a circumstance that is relevant.

Mr. MCCLOSKEY. Right.

Mr. RUCH. What the Clark decision says is that if the employer has more evidence than the employee, the employee is out of court before we even start.

Mr. MCCLOSKEY. Just drop it right there?

Mr. RUCH. Just right there. And that sort of negates the essence of what we are talking about.

Mr. MCCLOSKEY. Okay.

Mr. RUCH. And we view these issues sort of not as abstract academic legal exercises. What we view at stake here is whether Congress wants a Federal work force that is unafraid to tell the truth.

Mr. MCCLOSKEY. OK. That is very helpful, Mr. Ruch. You both feel the MSPB process has, in essence, been an abysmal failure; is it safe to categorize?

Mr. KEENER. We would agree with that, sir.

Mr. MCCLOSKEY. And how much of this—and we are in subjective areas—is attitude because of the political appointment process? Is it possible this is going to change now with a different appointment relationship on the Board?

Mr. KEENER. We believe that to be true, also.

Mr. RUCH. We think it certainly helps. But we think that part of it is not political in the sense of—in the sense of partisan politics.

A lot of it has to do with the way people view their role, whether they want to be proactive in addressing these issues, or feel that the problem is not enough people know about the venue and that if we had a better advertising campaign, that would be the end of it.

Mr. MCCLOSKEY. You definitely feel, both of you, that there is a management bias, that it is not a neutral body; is that right?

Mr. KEENER. I think the statistics show that, yes.

Mr. MCCLOSKEY. Well, I don't know if the statistics per se show that. Obviously, if 5 percent get redress, hypothetically, it is possible; is it not? Except you had the benefit of many cases of knowing and being close to these cases. Hypothetically possible that 95 percent of them did not reserve redress?

I mean, I am not asserting that, but hypothetically trying to deal with the issue.

Mr. KEENER. In arbitration cases where you are less formal, where you tend to be least legalistic, you tend to get a better hearing. That has been the history of it. We have actually benefited, in many cases, by the very conservatism of the Board, because we hold it up as an avenue that is not one that should be taken. They

should go to arbitration, even though arbitration costs the unions a greater amount of money.

So we have used that rank conservatism, if you will, to our benefit, to bring people into the forum where we have more control.

Mr. McCLOSKEY. Mr. Ruch and also Mr. Keener, do you have any opinion on the administrative law judge proposal?

Mr. KEENER. No.

Mr. RUCH. We favor the notion of an administrative law judge corps, of which MSPB administrative law judges, we also favor their upgrade, should be a part. We think that particularly in this area the independence of the decision makers from agency incentives is the most critical, because they are deciding cases between the employees and the agencies.

Mr. McCLOSKEY. So, in essence, so you agree with Mr. Gekas and other witnesses here today? How could you document to a neutral observer that there is such management bias in this agency historically?

Mr. KEENER. Again, the——

Mr. McCLOSKEY. Well, I guess a concern for the independence of the agency, obviously, appearances of professional competence.

Mr. KEENER. So easy to make mistakes for the non-attorneys. As Mr. Ruch points out, if you don't have an attorney, you are crippled going into the system because it is a very complex system. And at many points you can fail. So if you are not with a qualified attorney, a very specialized attorney, then you are at a disadvantage going into the system.

Whereas in arbitration cases, for instance, it is taken into consideration that you are dealing with, in many cases, with nonprofessionals. So the system itself is set to cause the employee to have concerns before he goes there. Because you have to hire an attorney, you have to be very well-versed, and you have to fight the system just to get into it.

You have to—as Mr. Ruch points out, you have to furnish the burden of proof and the management doesn't have to provide you anything. In arbitration procedure, it is much more open, much more lenient, on the appellant.

Mr. RUCH. I was going to suggest that the best way to illustrate it is by looking at one or two individual cases, if you could agree that one or two were representative, then sort of take that through the process. And one of the cases, Mr. Chairman, I believe that you are familiar with, because you testified here a couple months ago, was Jeff Van Ee, the EPA employee from Las Vegas, who was reprimanded. And his matter has never been resolved. His reprimand is now moot.

Mr. McCLOSKEY. OK.

Mr. Ruch, you commented about making agencies accountable, I guess, at the intra-agency level. Can you elaborate on that a little bit more? What role do you see for the MSPB in that?

Mr. RUCH. It is sort of hand in hand with the notion of a stay, which is that if the agency had not done a bona fide good faith review of the action before it was taken, that the action is stayed and the agency has to go back and take another look at it, and to put some burden back on the agency to try and resolve these matters individually before it has to be litigated.

Mr. MCCLOSKEY. If there is one message that you would want to get across to Mr. Erdreich, both of you, in one or two sentences, what would it be? He is not here, but his good staff is.

Mr. KEENER. Get away from using form over substance. Become more people oriented, if you will, more appellant oriented, and get away from being or having what appears to be that automatic bias toward management. That is the appearance. Whether it is the reality or not is immaterial, if it is the appearance going in. You won't get the cases that need to come forward.

Mr. RUCH. I would say, welcome. But the point that he was making about the Vice President's reinventing government effort, if they could look at sort of the mission and what worked rather than concentrating on the legal procedures, I think they would be a lot better off.

Mr. MCCLOSKEY. Well, gentlemen, I thank you very much.

Is there anything you want to add in parting?

It was excellent testimony, very good statement from both of you and appreciate the learned detail from Mr. Ruch's statement.

Our next panel is Mr. Peter Broida, attorney and author.

Welcome, Mr. Broida.

If I am saying that correctly?

Correct me, if I am not.

Mr. BROIDA. You sure are, sir, thank you very much.

Mr. MCCLOSKEY. I read your statement last night. Appeared to be very straightforward. It is accepted for the record.

You can proceed as you are most comfortable.

STATEMENT OF PETER BROIDA, ATTORNEY, AUTHOR

Mr. BROIDA. Thank you, Mr. Chairman.

Since you have my statement and since I have had the benefit of hearing the statements of others, I will forego the statement and address some of the concerns that have been raised here.

First, several times you have asked about the perception of management bias of the MSPB. I have been working with the MSPB as an advocate before them in the Federal circuit since 1978, the Board's inception. There has not been one sustained case of bias against its hearing officials or administrative judges.

I think the appointees, the political appointees to the Board, have been of the very highest caliber. We have had our differences, of course. But with respect to management bias, I think you have to recognize that early on, the Board decided a number of cases where the bias was inherent in the case law and not in the personalities of the individuals appointed to the Board, particularly, for example, with respect to penalty determination.

Early on, the Board decided a case called *Douglas* v. *Veterans Administration,* where the Board ceded to Federal employer agencies essentially the ability to determine penalties against employees, subject only to a review standard of arbitrary and capricious or unreasonable. So the agency that fired the employee or demoted the employee received the primary deference from the MSPB reviewer once the facts were established, once the charges were established, of what the penalty ought to be.

Any labor arbitrator will require an agency fully to justify a penalty and any labor arbitrator will, if possible, impose progressive discipline.

The Board takes the position that progressive discipline is not required. In fact, it is very difficult now to tell what the Board's position is with respect to progressive discipline. So since 1978 or so, very few penalties have been substantively reassessed by the Board once the agency has proven the underlying misconduct that has led to that penalty.

Second, in the area of performance cases, early on the Board decided that if the agency demonstrates its charges are established by substantial evidence, a very low standard, if the performance standards, even if subjectively interpreted by the Board, are substantively fair, then the Board will not, and by its case law cannot, mitigate a penalty, even though any reasonable observer would say that the penalty should have been mitigated to a demotion or perhaps to a reassignment.

This type of case law establishes a very easy case for management, if they get their facts straight and if their attorneys do a reasonable job before the Board. And if you want to call that bias, that is what it is. But, in fact, it is a product of case law, not the personalities of the members of the Board.

The second area that you have been discussing today is the base of whether——

Mr. MCCLOSKEY. Mr. Broida, could you comment on the statistics that have been used by GAP as far as a 3- to 5-percent redress rate? One year only one or zero whistleblower cases received redress or something to that effect.

What are we up against here? I think I may know implicitly from what you are saying, but could you comment on that specifically?

Mr. BROIDA. Yes, sir. There are two components of the Board's case law that have been discussed here. One is its overall record with respect to all appeals.

Second, with respect to whistleblower appeals. Whistleblower appeals are a very small fragment of the Board's general universe of case law. There is an enormous amount of emphasis given to whistleblower cases with respect to the overall case adjudication function of the Board, if a case survives the pleading stage, that is if the case is timely filed, if it is within the jurisdiction of the Board, the chances are better than lesser that it is going to be settled, 50 to 60 percent of these cases are settled.

Now that doesn't suggest for a moment that the cases are only settled on advantageous terms to the appellant, but they are settled and they wash out of the system in one fashion or another. Of the remaining cases, about 20 percent of them are either reversed or mitigated by the Board, meaning about 80 percent of the cases that go to adjudication before administrative judges, and by adjudication, I mean cases that are heard on the merits or decided on the merits without a hearing, result in agency victories, 80 percent. If you take whistleblower cases, the statistics are not as complete.

I haven't seen the Board's annual report for the last fiscal year on how it has disposed of its whistleblower caseload, but my guess is that most of the cases that are brought in on the basis of whistleblowing are being dismissed by the Board now on jurisdictional

bases. Either the person has claimed that they are a whistleblower on the basis of an EEO complaint or grievance, which by case law the Board has decided does not qualify for whistleblower status, or a person is complaining of what they believe to be a personnel action, which the Board disagrees with their definition of what a personnel action is and the case gets dismissed.

Very few cases are proceeding to full adjudication under the Whistleblower Protection Act. And so I suppose that GAP's statistics are correct. The problem that GAP is explaining and that some of the other organizations here are presenting is the Board's approach to definition of what qualifies for protection under the Whistleblower Protection Act.

One of the areas that are the Board has emphasized in the past year is what constitutes gross waste, gross mismanagement, or gross fraud?

The Board through its case law has created such a high standard for qualifying for protection under the Whistleblower Protection Act that you have to disclose major operational deficiencies within the agency to qualify for any type of protection. Most employees, particularly those in a lower level, will not see that level, I am talking about millions or billions of dollars, of mismanagement or waste or fraud. They are not going to see that type of problem within their agency. They are going to see something that is much more limited, and what the Board has been doing is imposing a pleading requirement on the whistleblower which is so high that it is excluding a lot of cases.

The other problem we have, the Board is creating for itself and for whistleblowers, is the definition that you asked about in response to some earlier testimony concerning what constitutes a reasonable belief. The Board has injected into the "reasonable belief" equation that was set by Congress, which seemed fairly straightforward, the notion that not only must there be a reasonable belief that a particular action constitutes mismanagement, fraud or waste, but that belief must be genuinely held. So the belief must not only be reasonable, it must be genuine.

And I cannot begin to explain because I don't understand myself what the Board has tried to conjure up in its case law in a distinction between a statutory standard of reasonable belief and a case law standard of a reasonable belief genuinely held. These types of decisions that the Board is coming out with are causing a large number of dismissal of whistleblowers' complaints.

And many of these whistleblower complaints might fall by themselves on the merits, if the Board weren't throwing up these types of adjudication roadblocks, as I perceive them. That is what is happening here. The substantive law is becoming extremely complex, and I think it is watering down the congressional intent, that whistleblowers receive some protection and the protection comes in the first instance from their own agency, where it is not really coming; and the second instance, from the Office of Special Counsel, where it is certainly not coming; and the third instance, from the Merit Systems Protection Board, which people seem to uniformly criticize with respect to this enforcement of the Whistleblower Protection Act.

Having gone through all that, let me talk for just a moment, sir, about the——

Mr. McCLOSKEY. Could you summarize or give me one or two sentences on what you think needs to be implicit in the last, you know, 3 or 4 minutes of your comments?

I mean, do we—do—is there, in essence, dereliction and failure and gross problems in this area, or is this—is this something we need to legislatively correct?

Mr. BROIDA. Yes, sir, I think——

Mr. McCLOSKEY. Is there a problem?

Mr. BROIDA. Yes. I don't think the Federal circuit is going to correct this. The Federal circuit, the chairman told you, and he is absolutely correct, affirms the Board at the rate of 96, 97 percent, which, of course, the Board has traditionally viewed as a strength of the system, showing that the Board is correct.

If you take a look at the counterpart agency of the Board, the Federal Labor Relations Authority, for example, which is subject to review by many courts of appeals, all regional courts, their reversal rate is much higher. So I would suggest that the Federal circuit is not likely to correct what the Board is doing with the case law.

The correction has to come from Congress. Congress set out a reasonably clear standard. The legislative history was reasonably clear. The definition of gross waste in the legislative history is nontrivial.

The Board acknowledged that in its case law in passing, and then went on to impose a very high standard with respect to what constitutes gross waste, gross mismanagement, and gross fraud. So what I would suggest is that the Congress or the staffers who write the legislative history, explain to the Board again that what we mean here is nontrivial. And when we say "reasonable belief," we mean an "unadulterated reasonable belief," not something that is watered down by some nebulous standard such as a reasonable belief genuinely held. That is the best I can suggest without being a legislative draftsman.

The matter of the administrative law judges has been raging for years and years. There are several issues that are involved here. One is equity. There are three principal personnel adjudicators within the Federal sector. There is the Federal Labor Relations Authority, the Equal Employment Opportunity Commission and, of course, the MSPB.

The EEOC and the MSPB have traditionally used attorney examiners to decide their cases. They have gone under a various number of titles. Some years ago, the Board gave its presiding officials, as they were then called, the title of administrative judge as a honorary working title, and the Federal Labor Relations Authority meanwhile, for all these years since 1978, has had its case law decided by administrative law judges.

Since I practice before all three tribunals, I know all three types of judges, not all of them, of course, in all three tribunals. I can tell you that the case law of the FLRA is no more or less complex than the MSPB. They all have their complexities. Some cases are straightforward, others not. If the FLRA's adjudicators are going to be administrative law judges, I can't think of a good reason why those in the EEOC or MSPB should not be either.

I must say, however, that with all this talk about decisional independence, I have known a lot of administrative judges within the MSPB, we talk privately. I attend their conferences from time to time. I have never once, since 1978 or before, heard any suggestion that any judge of the Merit Systems Protection Board, however titled, was improperly influenced by either a Senior Executive Service Regional Director, or by individuals within the Office of Appeals Counsel of the Board or its General Counsel, or by the political appointees.

So I think the question of judicial independence is moot because it is already there. We have an independent cadre of MSPB attorney examiners. I think that the real issue——

Mr. MCCLOSKEY. So again, you are probably getting to it, Mr. Broida, you are giving excellent testimony, but where do you come down on that issue?

Mr. BROIDA. I favor them being administrative law judges as a matter of equitable treatment. I think they are doing every bit the job that the ALJ's are doing for the Federal Labor Relations Authority. I can think of no reason to distinguish them.

For the professional association, it is a money issue. If you get 70 or 80 administrative law judge positions where they used to be administrative judges, they are all going to earn $15,000, $20,000, $25,000 more a year than they were before. That is $1 million or $2 million or $3 million a year they have just earned for one bargaining union. I think it is a wonderful thing to do for those folks.

Mr. MCCLOSKEY. It is understandable.

Mr. BROIDA. Yes, if I were their professional association, I would certainly encourage it, too. And there is one additional advantage that might come of all this; the Board's judges are traditionally drawn from the Civil Service ranks.

Many of them are still in the organization after having been recruited in the Federal Employees Appeals Authority, which was the predecessor to the MSPB. I think it is time that the Board brought in some administrative judges or ALJ's from other walks of life than the Civil Service. And one component of that would be if they were made part of the ALJ cadre, there would be some mobility from agency to agency. I think that would be an excellent thing.

Sir, those are my comments. I hope they have been of some use to you.

[The prepared statement of Mr. Broida follows:]

PREPARED STATEMENT OF PETER BROIDA, ATTORNEY, AUTHOR

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify today. You have asked me to state my concerns about operations of the Merit Systems Protection Board and to suggest improvements to those operations. As a practitioner before the Board and an author of a treatise on Board practice, I offer the following suggestions.

First, the Board should expedite headquarters consideration of cases. Board litigation generally follows a two step process. There is a decision issued by a regional office by an administrative judge. Often that decision is subject to review by the Board, which then issues its own decision either summarily affirming the regional or "initial" decision of modifying or revising that decision through a longer opinion prepared at the Board's headquarters.

The Board requires its regional offices to issue decisions within 120 days. Administrative judges, who are retained or advanced in grade on the basis of performance standards, uniformly expedite their decisions to meet those goals, since those goals generally form a component of the judges' performance standards.

Once a case reaches the Board headquarters level, the delay can be considerable before the case is decided. Cases of complexity may linger with the Board for well over a year before a decision is issued on a party's petition for review.

No regulatory or statutory requirement imposes upon the Board an obligation to issue its decisions within a particular period of time. 5 U.S.C. 7701(i) essentially calls upon the Board to announce when it expects to decide cases that are over half a year old. The Board does that by placing in its lobby at its headquarters offices a list of overage cases with a note that it will attempt to decide those cases within the next 60 or 90 days.

Adjudication delay at the Board is most likely the result of sequential review of cases by Board members who can individually place holds on decisions until they have had the opportunity to review files or to request rewrites of draft decisions from the Board's Office of Appeals Counsel. Whatever the reasons for the delays, the impact is significant. Delay in adjudication by the Board prolongs unemployment by individuals who could, with a final Board decision, either terminate their litigation and get on with their lives or pursue the litigation to EEOC or to the courts. Delay also adversely impacts the Treasury. Under Board law, an individual need not mitigate damages through interim employment while the Board appeals process is underway. Delays in dispositions by the Board at its headquarters level means, in some cases, agencies pay more back pay than they should. The impact of the delay in adjudication upon employees is ameliorated to an extent by the interim relief procedures that now favor employees who prevail at the regional level. But as to the many employees who do not prevail at the level of the initial decision, prolonged adjudication by the Board exacerbates the disruption to their lives, delays ultimate review by the courts, and may well increase the financial burden of ultimate reinstatement upon the federal government. All this could be avoided if the Board were directed by statute to resolve its cases within 120 or 180 days, with a provision allowing a deviation from the mandate under extraordinary circumstances.

Another concern involves the extraordinary complexity of MSPB law and procedure and the very limited ability of many appellants (and some agency representatives) to deal with those complexities. The regulatory processing of a Board case is complicated, and it is made all the more so by case law that adds procedural complexities. The Board's administrative judges are told that they are to provide some limited assistance to pro se appellants, but they are to avoid becoming advocates of one party or another. Most judges rely upon canned procedural orders developed at the level of the headquarters office to inform parties of their rights and responsibilities. Often the first personal introduction between the appellant, or counsel, and the judge is a prehearing conference convened after issues have been identified, exhibits tendered, and witness lists have been prepared. At that point the judge will often solicit settlement overtures from the parties, provide some encouragement for settlement, and allow the case to proceed either to adjudication or to settlement.

There are so many procedural defaults of both appellants and agencies, so many allegations of bias against administrative judges by appellants, and so little general understanding of Board law and practice among those I meet and lecture to, that I am convinced that the Board's constituent public does not understand its procedures or the law that the Board has developed. The Board must be encouraged to make an affirmative responsibility of its judges the education of the parties who appear before the Board concerning the regulations and case law that governs the disposition of an appeal. Further, the Board must ensure that its judges not only encourage and approve settlement agreements that are technically adequate, that is, that do not break a law or rule governing the civil service, but that they ensure that the parties agree to a settlement that is substantively fair. The judges ought to use their experience in providing evaluations of the substantive fairness of settlement to the parties. That will go far to reduce the number of challenges to settlements that the Board must now adjudicate.

At the headquarters level, the Board defaults numerous appellants and some agencies for very minor deficiencies in the processing of petition for review. Although procedural defaults are a means of case control, the Board should avoid technical defaults whenever possible. It should only be when parties flagrantly disregard Board processes, or substantially miss time limits established for filing of administrative proceedings, that the extreme sanction of dismissal should be imposed by the Board. Now dismissals are frequent and, often, for no more than missing by a day or a week the administrative period for filing a petition for review or for failing immediately and properly to correct a deficiency such as a lack of a certificate of service. Once again it is imperative that the Board treat pro se appellants or representatives who infrequently appear before the Board with more consideration that a busy federal appellate court would treat experienced advocates who cannot follow the court's rules.

Finally, a word or two about alternate dispute resolution. The Board is charged by statute with alternate dispute resolution of cases. 5 U.S.C. 7701(h) allows the Board to adopt alternate dispute resolution techniques that would produce final opinions. The Board experimented with that process a decade or so and the effort failed because the program, known as voluntary expedited appeals process, attempted to convince parties that the Board's administrative judges were handling their cases as labor arbitrators might, and the judges lacked the independence and the experience to provide that type of adjudication. I think the Board should try again. The Board should maintain a list of labor arbitrators in each region and allow appellants to utilize arbitrators, who would still be bound by Board precedent to guide the substantive resolution of cases. The cost of the arbitrator could be borne by the appellant, or by the appellant and the agency jointly, or it could be paid by the Board. The finality of arbitrators' decisions would reduce the amount of Board litigation, quicken the resolution of disputes, most likely increase the number of settlements, and enhance the perception of the Board as a neutral adjudicator.

There remains for another day the question of whether to merge civil service, EEO, and labor relations adjudication function. My interest has just been in highlighting a few practices of the Board as it is presently constituted that, if corrected or modified, could enhance the statute and the efficiency of that agency.

Mr. MCCLOSKEY. Thank you, Mr. Broida. You are being very helpful. I am sure you heard previous testimony as to problems of discovery.

Mr. BROIDA. Yes, sir.

Mr. MCCLOSKEY. And the need to protect employees' rights to achieve documents and so forth, is that a problem? I mean, in essence, could the agency just say no and that is the end of it, there are no procedural safeguards that the MSPB can or will mandate?

Mr. BROIDA. Oh, no, no, the agency won't say no to me. And, when they do, I request the assistance of administrative judges. And, for an example, I had a case a few months ago involving—it was a sexual harassment case, where one of the witnesses for the agency was less than forthcoming with respect to discovery and did not want to appear voluntarily. That witness had an attorney who resisted the Board's subpoena process.

I took the matter to the administrative judge, a very fine judge here in the Washington regional office of the Board, asked that the Board take that subpoena request into the United States District Court to enforce the subpoena.

The witness' attorney would still not back down. The case was filed with the assistance of the Board's Office of General Counsel in United States District Court. The subpoena was enforced.

The witness came to a deposition, was deposed, and ultimately showed up at the hearing. I had no problem with the Board's discovery procedures. That is not to say I agree with all the rulings, of course.

Sometimes I don't get the discovery I think I should, that is life. Same thing would happen in court.

Mr. MCCLOSKEY. Are they more likely to stonewall someone representing himself pro se?

Mr. BROIDA. Yes, yes. And that is the problem. As I mentioned in my statement, the real difficulty with Board practice comes with the pro se appellant. And it is really not a question of whether they receive their costs back. It is a question of whether they know what the law is.

The Board law has become exceedingly complex, made so in large part by the MSPB. For example, the Board adheres to the doctrine that if you have a request to an administrative judge, and the ad-

ministrative judge declines that request, you are supposed to protect your position with the Board by filing or raising an exception with the Board.

Well, nobody knows about that except those people who write textbooks or practice before the Board all the time. The pro se appellant will never know it and then if the exception isn't filed, and this is a throwback to the days before the Federal Rules of Civil Procedure, when exceptions were allowed, why, then you can't preserve your point for review by the MSPB. That is just one minor, although extraordinary, example of how the Board complicates matters with its own case law.

So the problem becomes the Board says to its administrative judges, you are to help the pro se appellant, but you are not to be an advocate for the appellant. And the administrative judges have a great deal of difficulty with that, because, after all, on the other side of the table is an experienced agency advocate who is quick to suggest the possibility of bias if there seems to be undue assistance to that pro se appellant.

It is a big problem. There are a lot of pro se appellants who may or may not have good cases but those cases are not being heard by the Board because of procedural faults by these appellants. I think that is the most unfortunate aspect of Board practice.

Mr. MCCLOSKEY. How about the concerns raised as to costs for these pro se appellants, as to their efforts?

Mr. BROIDA. I don't see that as a big problem. Yes, there are some pro se appellants who spend money to get photocopying done, which the Board isn't even going to award to an attorney because it is not properly considered part of counsel fees, or they take a cab ride and they can't recover that, or perhaps they—let's see, what else might happen? They might have some witness fees that they can't recover.

I don't see that as a big problem. I don't see any pro se appellants who have not been able to survive the Board's litigation process because they haven't been able to recover costs.

Certainly, a big problem is the cost of hiring an attorney, which can be considerable. But that is built into the system. I can't suggest that the Board should provide funds for private counsel before the onset of a case.

Mr. MCCLOSKEY. Now, you have heard testimony about the need to expedite and conclude cases, I guess at least some may go on indefinitely. Would you favor legislatively mandated deadlines or could you comment from that on your practice?

Mr. BROIDA. All right.

There are really two comments to this, because there are two components to the Board's practice. First, is the hearing before the administrative judge at the regional office, any one of 11 regional offices, some 70 or 80 regional judges. And these folks have performance standards which require them to issue timely disposition of cases. The Board's requirements are essentially that the case be decided within 120 days. Most of these judges try to get their cases decided within 90 days.

By the way, that is very short, it puts a lot of pressure on advocates, I can tell you from a lot of experience. Be that as it may, they do their job, they get the cases done.

Somebody files a petition for review with the Board. In many cases, the Board decides the petition or review summarily, without any explanation other than the fact the petition doesn't meet the Board's regulatory criteria, and it does so quickly, 30, 60, 90 days. Other cases of complexity, cases of importance, the Board can sit on for 1, 2, or 3 years. The statute already has a provision requiring the Board to publicly announce cases which seem to be becoming rather old.

And what the Board does, and it is almost a joke with those who practice before the Board, is that it publicly announces the existence of these overage cases by mimeographing or photocopying a list of old cases, they put it in their lobby.

If you happen to be in their lobby, you take a look. In fact, your case is sitting there and it is an old case and someday the Board promises it is going to get to it. That is just not sufficient. And the problem the Board has experienced is sequential treatment of these cases.

There are three members, they hand the files back and forth to one another after they are reviewed by staff. Some of them just never get decided. Meanwhile, the clients kind of languish.

What do they do? They write their congressman, they complain to lawyers, they write letters. The cases still don't get decided. It is a problem with the headquarters office. And legislatively, all that needs to be done is the Board be directed to decide their cases within 120 days, or the case will be considered to have affirmed the result below. And if the disappointed litigant wishes, they can take their case to court.

In other words, free the case from the Merit Systems Protection Board, because unless it is an EEO case, you cannot spring that case free and your client sits in limbo.

Mr. MCCLOSKEY. Again, are you saying 120 days; if it is not resolved, what happens then?

Mr. BROIDA. Then the decision below is considered final and you can take your case into court. Or the agency, if they happen to be the loser, can go to the Office of Personnel Management and get them to take it into court. Get the case out of the Board's bureaucracy.

Mr. MCCLOSKEY. Excellent testimony, Mr. Broida. I really appreciate it.

Do you think the Board should be permanently authorized or is that a concern for you one way or the other?

Mr. BROIDA. I think the Board is here to stay. I think the bigger question is whether the system, which includes the EEOC, the comptroller general, the MSPB, the FLRA, should be continued in its present form.

There is a fantastic amount of duplication, a waste of resources, an overriding involvement by Federal courts and Federal judges. I think it could be vastly simplified. But that is a step, I suppose, that Vice President Gore has to address.

If the system is not unified, then I think the MSPB should certainly be permanently authorized, certainly.

Mr. MCCLOSKEY. Well, anything else you want to add?

Mr. BROIDA. No, sir.

Mr. MCCLOSKEY. Thank you. I feel you contributed immensely.

Mr. BROIDA. Thank you very much, Mr. Chairman.

Mr. MCCLOSKEY. Thank you very much.

And our concluding panel, moving right along here, is John Markuns, Vice President, and Pamela Jackson, Secretary, Merit Systems Protection Board Professional Association.

Welcome, Ms. Jackson, Mr. Markuns. I think I know what you are going to testify about and what your ideas are.

Your statements are accepted for the record, and please state your concerns as you are most comfortable.

STATEMENT OF JOHN MARKUNS, VICE PRESIDENT, MERIT SYSTEMS PROTECTION BOARD, AND PAMELA JACKSON, SECRETARY, MERIT SYSTEMS PROTECTION BOARD

Judge JACKSON. All right.

Well, as you know, my name is Pamela Jackson. I am an administrative judge from the Atlanta Regional Office of the Merit Systems Protection Board. And I am here to speak on behalf of the Professional Association which represents administrative judges of the Merit Systems Protection Board.

I am not here to represent the views of the agency. My main purpose in being here is to urge you to grant administrative judges the decisional independence by converting the administrative judge position to that of the administrative law judge. And we believe this is necessary so that we may be afforded the protections afforded by the Administrative Procedures Act.

As you know, the Board consists of approximately 60 judges nationwide. The seasoned judges are diverse. We are 34 percent women, 21 percent minority. Most of us meet the eligibility requirements established by OPM for the administrative law judge position.

Most of us are at the GS–15 level currently, and most of us have more than 10 years of hearing experience or other type of legal experience.

We are not really concerned about having our qualifications evaluated by OPM or any other body established for such purpose, but we are concerned about decisional independence.

Mr. Broida made a statement earlier that this was primarily a pay issue for us, which it is not. I would—last year we introduced a bill to gain decisional independence which had none of the pay benefits that an administrative law judge position would entail. We asked strictly for the protections of the Administrative Procedures Act.

[The prepared joint statement of Ms. Jackson and Mr. Markuns follows:]

PREPARED STATEMENT OF PAMELA JACKSON, SECRETARY, MERIT SYSTEMS PROTECTION BOARD AND JOHN MARKUNS, VICE PRESIDENT, MERIT SYSTEMS PROTECTION BOARD

Mr. Chairman, Congressman Burton and Members of the subcommittee:

My name is Pamela Jackson. I am an administrative judge in the Atlanta regional office of the Merit Systems Protection Board. I am not here to speak on behalf of my employing agency, but here to speak on behalf of the administrative judges represented by the Merit Systems Protection Board Professional Association. I have been an administrative judge in the Atlanta regional office since 1989 and previously served as a litigator for the Federal Labor Relations Authority.

As you consider the board's reauthorization, I urge you to grant the administrative judges of the MSPB stronger decisional independence by converting the administrative judge position to that of administrative law judge, such as that proposed by HR–1889, so that we may enjoy the protections afforded by the protections afforded by the Administrative Procedures Act.

As you may know, the corps of seasoned administrative judges at the Merit Systems Protection Board now consists of 60 judges nationwide—over 34 percent of whom are women and 21% of whom are minority. We are all highly qualified attorneys and meet OPM's eligibility qualifications for ALJ. Most board judges are at the GS–15 level, have more than ten years of hearings or other legal experience and regularly attend judicial training courses. Including courses at the National Judicial College. We are not concerned about having our eligibility qualifications evaluated by OPM or any other body established for such purpose. Many of us are presently on OPM's ALJ register or have recently applied.

Our primary concern is that of decisional independence. Two thirds of the Federal work force have appeal rights to the board. The subject matter of our cases is diverse involving, among other things, whistleblower appeals, sexual harassment claims, drug testing issues, and handicap discrimination. In addition to misconduct cases, we are called upon to determine whether employees have performed acceptably in positions ranging from chemist to air traffic controller and from custodian to physician. Given the nature of the cases we decide, the question arises whether judges deciding these issues, which involve substantial numbers of Federal employees, should have the same protections afforded those judges who decide, for example, entitlement to Social Security benefits or labor issues. We think the answer to that question is yes and urge you to conclude the same.

My name is John Markuns. I am an administrative judge in the Boston regional office of the Merit Systems Protection Board. Like Judge Jackson, I am not here to speak on behalf of my employing agency but here to speak on behalf of the administrative judges represented by the Merit Systems Protection Board Professional Association. I have been employed by the MSPB as an impartial adjudicator for over 13 years. Prior to my employment by the Board, I served in the late 1970's as the Washington DC general counsel to the National Association of Government Employees. I have thus been afforded a unique perspective during my legal career. I have not only observed and participated in the process leading to the civil service reforms of 1978 but have observed and participated in the struggle to make those reforms work. Like Judge Jackson, I would like to emphasize that genuine decisional independence is our primary concern. We believe that this change will prove to be another significant civil service reform.

Reauthorizing a more impartial and effective MSPB will send a strong message to the Federal work force that in reinventing Government, change will be implemented fairly and employees' due process rights will not be lost. It will also help stabilize the current administrative judge corps during a time that new and complex challenges confront the board.

Affording Federal employees the Administrative Procedures Act (APA) guarantee that appeals be assigned in rotation to decisionally independent judges can only strengthen employee confidence in the fairness, impartiality and integrity of the hearing process. Extending APA guarantees to the appeals process will also allow MSPB to further test alternative dispute resolution or "ADR" as a cost-effective way of coping with a rising caseload of complex cases. Correcting the imbalance between MSPB administrative judge and ALJ compensation methods may also stem the loss of experienced administrative judges to the ALJ ranks and enhance the career development of all those working in the evolving area of employment law.

Case assignment by rotation is an elemental principle at the core of the Administrative Procedures Act. This policy precludes case assignments based on extrajudicial considerations or the perceived leanings of individual judges. The ban on performance-based pay raises to judges is another fundamental and equally important principle which has always been at the core of the APA. This prohibition allows judges to focus solely on the record evidence, legal precedent and arguments of the parties in rendering a decision, free from concern that this decision will affect his or her pay. Presently, neither of these two important APA protections are afforded Federal employees in MSPB proceedings. There are no limits on agency discretion to assign cases and pay raises are directly linked to annual appraisals rating the quality, number and speed of decisions. Extending APA guarantees to appeals by Federal employees and especially by whistleblowers is essential before the protections of legislation such as the Whistleblower Protection Act can be fully realized.

I am sure that members of the subcommittee are aware that whistleblower appeals and, more recently, sexual harassment cases, present some of the most controversial and difficult legal proceedings found within Government. With the pos-

sible reform of the Hatch Act, new controversies and disputes may be just over the horizon. While MSPB is a bipartisan independent agency, it remains within the executive branch of Government.

When controversial cases arise with the accompanying public scrutiny, those responsible for the operation and mission of the agency may become especially concerned about the impact of a controversial decision on their own careers. So long as extrajudicial controls such as pay ratings and recommendations are allowed to exist, MSPB judges will never be truly free to focus, no matter how hard we try, only on the record evidence, legal precedent and arguments of the parties in rendering a decision. In the back of our minds will always be a concern whether those supervisors responsible for our ratings will approve or disapprove of our actions. Hopefully, we have and will continue to discount these concerns. But we respectfully suggest that extending APA protections to MSPB administrative judges will largely alleviate if not eliminate this unnecessary tension in the adjudicatory system. Just as importantly, it will be a clear and unambiguous sign to the Federal workforce that fairness and impartiality is foremost in our minds. Simply put, to do our best work in deciding these cases, we need the additional insulation which APA protections can provide.

Granting MSPB administrative judges the status of administrative law judges may also provide additional practical benefits to both MSPB and to the Government as a whole. While the raw number of cases appealed to MSPB has held steady, there has been a significant increase in the number of complex appeals, including multiple-day hearings, resulting in greater demands on our ability to efficiently manage already full dockets. Strengthening our decisional independence and the parties' perception that we are decisionally independent will provide new incentives to the parties to utilize ADR. Our ability to facilitate settlement will be enhanced because the parties will no longer have reason to doubt that our settlement suggestions are based on our analysis of the issues and the parties' interests and are not made only because we want to enhance our pay rating. It would also become easier for MSPB to design pilot projects which might offer a mediation service to the parties, particularly in appeals where several settlement issues are involved; there is poor communication between the parties or personality clashes; there is a need to focus on content; or the parties want confidentiality during their settlement discussions. In such cases, an APA-protected judge would be in a much stronger position to adjust his or her docket to allow the parties to engage in mediation while monitoring the status of their efforts, without concern that an administrative deadline might be missed which could adversely affect the judge's pay rating.

Finally, granting MSPB administrative judges ALJ status may also finally put an end to confusion about the proper pay classification for MSPB administrative judges and reverse the growing compensation and statute gaps between MSPB administrative judges and ALJ's. Almost since the board's inception, there have been constant internal conflicts regarding the proper pay classification of MSPB judges. MSPB administrative judges are currently classified as attorney-examiners under the GUS–905 classification series, a series over 30 years old. During my tenure at MSPB (beginning in 1979), judges were recruited at GS–13 with a non-competitive career ladder to GS–15; promotions to GS–15 were then frozen and the job subsequently reclassified to a GS–14 full performance level, with a limited number of promotions available to GS–15. Most recently, in March 1991, an expert classification consultant and former chief classifier for OPM was hired by the board to examine the classification of our positions. He audited over 70 case files and interviewed almost two dozen judges and chief judges in several regional offices. He recognized that the GS–905 series was largely inapplicable to our positions, but suggested in his first draft report to MSPB in December 1991 that by extrapolation and analogy to a judicial-type position such as ALJ, the MSPB administrative judge position could support a GS–16.

It is the association's position that the expert consultant's initial position was a sound one in that the knowledges, skills and abilities of the administration law judge and the MSPB administrative judge are identical. In this regard, we respectfully direct attention to exhibits 1 and 2 attached to our written testimony—an OPM document summarizing the knowledges, skills and abilities required of an ALJ and the position description for a full-performance level MSPB judge. We also direct attention to recommendation 92–7 of the Administrative Conference of the United States (ACUS). In that recommendation, ACUS concluded that where Congress determines that ALJ's should preside over hearings in specific classes of cases where ALJ's do not now preside, it should specify that those administrative judges presiding over such proceedings at that time who can satisfy OPM's eligibility qualifications for ALJ's be eligible for immediate appointment as ALJ's.

The expert consultant's draft was rejected by MSPB, but a subsequent draft finding that our positions supported a GS–15 at the full-performance level was accepted by the board. Before implementing the findings, however, MSPB determined that a single agency classification guide be developed to accommodate a new career ladder for administrative judges beginning at the GS–11 level through GS–15. GS–11, GS–12 and GS–13 positions are now considered to be developmental positions.

Eight attorneys who were initially recruited as staff attorneys for the regional offices were reassigned to these new developmental positions, effective June 28, 1992. These judges are assigned appeals but may only adjudicate these cases under the close supervision of the chief administrative judge. A copy of the developmental's position description is attached as exhibit 3. Parenthetically, it is unclear whether HR–1889 would cover those attorneys since assigned to developmental positions. The newly recruited attorneys are a diverse and representative group. Moreover, some of the attorneys recruited are clearly over-qualified for their grade and may now meet the eligibility qualifications of seven years of legal experience required by OPM. In any event, we suggest that a transition provision be included in any legislative change to the status of MSPB judges requiring a gradual phase-out of these developmental positions, while affording this small group of incumbents an opportunity to be converted to ALJ status upon meeting OPM qualifications.

As for the corps of non-developmental administrative judges clearly covered by HR–1889, the association would not oppose a more gradual phase-in to the ALJ pay levels than provided for in current law, although we understand that first year increase in costs to the board would be less than $200,000. In any event, we consider the overall costs of this bill under current law to be minimal compared to the increased costs which may inure to the government as it gradually loses its most experienced employment law adjudicators to the ALJ ranks. In this regard, an experienced MSPB judge can save the parties, most often the Government, the total first-year cost of the bill each time the judge correctly resolves or facilitates settlement of a complex adverse action appeal, avoiding reversal by the full board, EEOC or the courts.

The association stands ready to cooperate with chairman Erdreich, OPM and the members and staff of the sub-committee in addressing any of the transitional issues arising from conversion. The sub-committee has an opportunity to provide for fair and impartial hearings for Federal employees by enacting HR–1889 or by amending the Merit Systems Protection Board reauthorization to remove salary reviews for judges and to provide for APA-type hearings for Federal employees, including whistleblowers. This concludes our prepared statement. We would be happy to answer any questions you might have.

DEFINITIONS

1. Knowledge of Administrative Procedures, Rules of Evidence and Trial Practices

Knowledge and application of rules of evidence and trial procedure. Knowledge and application of laws and administrative procedures.

Administrative Law Judges examine pleadings, orders and other documents to prepare for pre-hearing or hearing conferences, or other matters, resolve preliminary and pre-trial motions (including discovery), and other issues. They conduct orderly hearings to ensure fairness and due process, rule on the admissibility of evidence and requests to exclude testimony, and may question or examine parties and other witnesses to obtain or direct clarification of testimony. Administrative Law Judges decide interlocutory motions including motions for summary-judgment. They evaluate arguments of counsel and study, analyze and evaluate pleadings, evidence and briefs. They research applicable subject matter or legal policy precedents, including legislative history of statutes, and decisions of courts and agencies and apply the facts before them in deciding cases. Administrative Law Judges expand their legal knowledge and keep abreast of developments in the field of law by attendance at seminars and professional meetings.

2. Analytical Ability

Ability to understand, interpret, and apply law. Ability to analyze, synthesize, and evaluate evidence to define issues and facts. Ability to assimilate technical subject matter.

Administrative Law Judges examine pleadings, orders and other documents to prepare for pre-hearing or hearing conferences, or other matters, resolve preliminary and pre-trial motions (including discovery), and other issues. During the hearing, they rule upon motions and the admissibility of evidence. They determine the probative value of evidence and competence of witnesses, and evaluate arguments presented by counsel. Administrative Law Judges also determine when the record can be closed and when supplemental procedures are needed. They must be able to analyze and synthesize extensive testimony and documentary evidence to identify relevant facts. They may conduct legal research on the applicability of laws to the subject matter when studying, analyzing, and evaluating pleadings, evidence and briefs.

3. Decision-Making Ability

Ability to make independent decisions in a fair and impartial manner. Ability to make decisions promptly.

Administrative Law Judges must be able, independently, to make fair, unambiguous and prompt rulings and decisions on procedural and evidentiary questions and on legal and regulatory issues. They must be able to present their rulings and decisions decisively and clearly. They must have the ability to make definitive rulings with little or no advance subject matter knowledge or notice. They must be able to decide cases notwithstanding the pressure of a heavy caseload or the scope and complexity of individual cases.

4. Oral Communications Ability and Judicial Temperament

Ability to express orally oneself concisely and convincingly. Ability to elicit facts by examining lay and expert witnesses or by other means. Ability to preside at and control conferences, hearings or meetings.

Administrative Law Judges must be able to speak clearly, concisely, and understandably; listen attentively; and deal patiently, courteously, tactfully, firmly and impartially with competing parties when presiding at hearings, conferences and meetings. The extent of these abilities in large part determines their success in presiding at and controlling hearings; eliciting facts from witnesses; explaining requests, rulings and decisions; and resolving conflicts between competing parties.

Administrative Law Judges must manage or control diverse situations and procedures to hear case complete, but timely and efficient manner while assuring due process. They must listen attentively and pa to all participants in hearings to collect relevant facts needed to decide cases. They must explain their and decisions clearly and concisely with tact, firmness, and impartiality so that their rulings and decisio understood. Tact, calmness, and sensitivity to the rights and needs of the competing parties are necess make the parties feel that they are being fairly and completely heard.

5. Writing Ability

Ability to write clearly, concisely, and convincingly. Ability to articulate, organize and render decisions effec

Administrative Law Judges must be able to organize and write clearly, grammatically, concisely and convinc to accomplish one of their most important work activities--writing orders and decisions. The quality of their w frequently determines the acceptability of their work products. Decision writing is as much an organizationa as it is a writing task because of the voluminous evidence that must be considered and the large numb issues to be decided.

6. Organizational Skills

Ability to work diligently without direction and manage caseloads.

Administrative Law Judges must work diligently without direction and must be able to manage caseloads that include numerous short cases, lengthy proceedings, or a mix of both. They must always be responsive to need for resolution of issues before them and must manage and use their time to ensure the prompt resolu of each case consistent with the complexity of the issues before them and the competing demands of the ot cases on their dockets. Administrative Law Judges must be able to use effectively their administrative, techni and professional staffs.

REASON FOR THE ACTION
1. IDENTICAL ADDITION TO THE ESTABLISHED PD NUMBER
2. REPLACES PD NUMBER
V 3. NEW

POSITION DESCRIPTION COVER SHEET

RECOMMENDED
4. TITLE
5. PAY PLAN | 6. SERIES | 7. GR
8. WORKING TITLE (Optional)
9. INCUMBENT (Optional)

OFFICIAL
10. TITLE
Attorney-Examiner (General)

11. PD	12. SERIES	13. FUNC	14. GRADE	15. DATE MONTH	DAY	YEAR	16. I/A	17. CLASSIFIER
GS	0905		15	6	5	92	X Yes ☐ No	Denise A. Yaag

18. ORGANIZATIONAL STRUCTURE (Agency/Bureau)

1st U.S. Merit Systems Protection Board
5th
2nd Office of the Board
6th
3rd Office of the Executive Director
7th
4th Office of Regional Operations
8th

SUPERVISOR'S CERTIFICATION

I certify that this is an accurate statement of the major duties and responsibilities of the position and its organizational relationships and that the position is necessary. I certify that Government functions for which I am responsible. This certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds and that false or misleading statements may constitute violations of such statute or their implementing regulations.

19. SUPERVISOR'S SIGNATURE	20. DATE	22. SECOND LEVEL SUPERVISOR'S SIGNATURE	23. DATE
		Thomas J. Lhaphear	6/10/92
21. SUPERVISOR'S NAME AND TITLE		24. SECOND LEVEL SUPERVISOR'S NAME AND TITLE: Thomas J. Lhaphear, Director, Office of Regional Operations	

FACTOR EVALUATION SYSTEM

FACTOR	25. FLD/BMK	26. POINTS	FACTOR	25. FLD/BMK	26. POINTS
1. Knowledge Required			6. Personal Contacts		
2. Supervisory Controls			7. Purpose of Contacts		
3. Guidelines			8. Physical Demands		
4. Complexity			9. Work Environment		
5. Scope and Effect			27. TOTAL POINTS ▶		27.

Factor 1 - Type II, Factor 2 - Level F'

28. GRADE ▶ 15

CLASSIFICATION CERTIFICATION

I certify that this position has been classified as required by Title 5, US Code, in conformance with standards published by the OPM or, if no published standard applies directly, consistently with the most applicable published standards.

29. SIGNATURE	30. DATE
Denise A. Yaag	6-5-92

31. NAME AND TITLE
Denise A. Yaag
Personnel Management Specialist

32. REMARKS

33. OPM CERTIFICATION NUMBER

1986 ed. 223-100/20311

FORM AD-332 (Reverse)

1

POSITION DESCRIPTION

MSPB Administrative Judge
GS-905-15, Attorney-Examiner (General)

Introduction

As an Administrative Judge (AJ) of the U.S. Merit Systems Protection Board, the incumbent hears and decides appeals from Federal employees, applicants for Federal employment, and Federal annuitants concerning any matter over which the Board has appellate jurisdiction. Those matters for which an appeal right is granted by statute or regulation include (but are not limited to) the following: Reductions in grade or removals for unacceptable performance; removals, reductions in grade or pay, suspensions for more than 14 days, or furloughs for 30 days or less for cause that will promote the efficiency of the service; removals, or suspensions for more than 14 days, of career appointees in the Senior Executive Service (SES); reduction-in-force actions affecting career appointees in the SES; denials of within-grade increases for general schedule employees; determinations affecting the rights or interests of individuals or of the United States under the Civil Service Retirement System or the Federal Employees Retirement System; negative suitability determinations; terminations during probationary periods or during the first year of veterans readjustment appointments; terminations during managerial or supervisory probationary periods; separations, reductions in grade, or furloughs for more than 30 days in connection with reductions in force; furloughs of SES career appointees; and failures to restore former employees following military service or following partial or full recovery from compensable injuries. Appeals also may involve allegations of reprisal for "whistleblowing," either as an Individual Right of Action or as an affirmative defense raised in connection with an otherwise appealable matter, as well as allegations of discrimination and/or other prohibited personnel practices. (Most Executive Branch employees may appeal to the Board, as may many employees of the U.S. Postal Service and the Tennessee Valley Authority.)

Major Duties

The AJ's principal duty is to adjudicate appeals. As part of this process, the AJ must perform the following: Conduct prehearing and status conferences in order to explore the possibility of settlement and to narrow and simplify the issues in the case; advise the parties with

regard to their respective burdens of proof, duties and responsibilities; oversee the discovery process; advise the parties with respect to settlement negotiations and provide them with help in facilitating that process; conduct hearings (including convening the hearing as appropriate, regulating the course of the hearing, maintaining decorum, and excluding any person from the hearing for good reason); and issue initial decisions. In order to accomplish these tasks, the AJ has the authority to: Administer oaths and affirmations; issue subpoenas; rule on offers of proof and receive relevant evidence; rule on discovery motions; resolve important credibility issues; and ensure that the record is fully developed and that each case is fairly adjudicated in every respect. The AJ also rules on all motions, witness lists, and proposed exhibits. The AJ may require the parties to file memoranda of law and to present oral arguments with respect to any question of law, order the production of evidence and the appearance of witnesses, impose sanctions, issue stays and protective orders, enforce orders and settlement agreements, and grant interim relief and attorney fees to prevailing appellants.

The AJ also may serve as a mentor, with responsibility for providing technical and administrative guidance to lower-graded attorneys. In addition, when designated by the Chief AJ, the incumbent may serve as a lead AJ for appeals resulting from new legislation or expanded Board jurisdiction, and in other extraordinary circumstances.

A significant portion of the AJ's time is devoted to the processing and adjudication of cases involving complex fact situations and "cases of first impression" requiring unique legal analyses. Appeals may cover a broad spectrum of unrelated areas of the law (e.g., criminal law, family law, or corporate law). A single case also may involve the application of multiple areas of the law.

Cases involve substantial motion practice and novel arguments and/or fact patterns. Resolution of the issues requires great skill in making credibility determinations, distilling facts, distinguishing legal applications, and imposing sanctions, and at times requires extensive research and analysis and obtaining and evaluating expert testimony or information on controversial topics. Resolution of issues may require the development of new law.

The AJ has significant discretion in managing his/her caseload in accordance with Board policy concerning quality, production, and timeliness. To the degree that it can be determined at the outset of the case, the incumbent routinely will be assigned the most complicated and sensitive cases in the office.

Because the AJ's initial decisions may be expected to form the bases for subsequent precedential Board and court decisions, they can affect the government-wide operations of departments and agencies. In this way, the incumbent's initial decisions may affect the efficient functioning of the Federal service, both on short- and long-term bases. Depending on the result of the case, initial decisions also can have significant and lasting effects on the careers and retirements of the affected individuals. An appellant may appeal an initial decision directly to the U.S. Court of Appeals for the Federal Circuit or, when issues of prohibited discrimination are involved, to the appropriate U.S. district court.

Supervision and Guidance Received

The incumbent works under the general supervision of a Chief AJ (Regional Director), who assigns cases without preliminary instructions, other than an occasional general discussion of unusual or significant issues and background information in appropriate cases. The incumbent is independently responsible for carrying out all case-processing and adjudication activities, and retains signatory authority for his/her assigned cases. The incumbent's decisions in complex cases are reviewed prior to issuance. In the vast majority of those cases, decisions are reviewed only for conformance with Board policy.

REASON FOR ACTION
1. NEW
2. CONTICAL ADDITION TO THE ESTABLISHED PO NUMBER
3. REPLACES PO NUMBER

POSITION DESCRIPTION COVER SHEET

P 13/15

RECOMMENDED
4. TITLE
5. PAY PLAN
6. SERIES
7. GRADE
8. WORKING TITLE (Optional)
9. INCUMBENT (Optional)

OFFICIAL
10. TITLE
Attorney-Examiner (General)

11. PD	12. SERIES	13. FUNC	14. GRADE	15. DATE MONTH	DAY	YEAR	16.	17. CLASSIFIER
03	0905		11	6	5	92	X Yes ☐ No	Denise A. Yaag

18. ORGANIZATIONAL STRUCTURE (Agency/Bureau)

1st: U.S. Merit Systems Protection Board
2nd: Office of the Board
3rd: Office of the Executive Director
4th: Office of Regional Operations
5th:
6th:
7th:
8th:

SUPERVISOR'S CERTIFICATION

I certify that this is an accurate statement of the major duties and responsibilities of the position and its organizational relationships and that the position is necessary to carry out Government functions for which I am responsible. This certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds and that false or misleading statements may constitute violations of such statute or their implementing regulations.

19. SUPERVISOR'S SIGNATURE	20. DATE	22. SECOND LEVEL SUPERVISOR'S SIGNATURE	23. DATE
		Thomas J. Dempsey	6/10/92

21. SUPERVISOR'S NAME AND TITLE	24. SECOND LEVEL SUPERVISOR'S NAME AND TITLE
	Thomas J. Dempsey Director, Office of Regional Operations

FACTOR EVALUATION SYSTEM

FACTOR	25. FLD/BMK	26. POINTS	FACTOR	25. FLD/BMK	26. POINTS
1. Knowledge Required			6. Personal Contacts		
2. Supervisory Controls			7. Purpose of Contacts		
3. Guidelines			8. Physical Demands		
4. Complexity			9. Work Environment		
5. Scope and Effect			27. TOTAL POINTS ▶		27
Factor 1 - Type I, Factor 2 - Level C			28. GRADE ▶		28. 11

CLASSIFICATION CERTIFICATION

I certify that this position has been classified as required by Title 5, US Code, in conformance with standards published by the OPM or, if no published standard applies directly, consistently with the most applicable published standards.

29. SIGNATURE: Denise A. Yaag
30. DATE: 6-5-92
31. NAME AND TITLE: Denise A. Yaag, Personnel Management Specialist
32. REMARKS
33. OPM CERTIFICATION NUMBER

1988 - 523 - 300 / 60252

FORM AD - 332 (Reverse) 4-87

POSITION DESCRIPTION

MSPB Administrative Judge
GS-905-11, Attorney-Examiner (General)

Introduction

This is a developmental position located in one of the eleven regional offices of the Merit Systems Protection Board. The Board is an independent adjudicatory agency charged with oversight of the Federal merit systems. The regional offices are principally concerned with the adjudication of appeals from Federal employees, applicants for Federal employment, and Federal annuitants concerning matters over which the Board has appellate jurisdiction. Those matters for which an appeal right is granted by statute or regulation include (but are not limited to) the following: Reductions in grade or removals for unacceptable performance; removals, reductions in grade or pay, suspensions for more than 14 days, or furloughs for 30 days or less for cause that will promote the efficiency of the service; removals, or suspensions for more than 14 days, of career appointees in the Senior Executive Service (SES); reduction-in-force actions affecting career appointees in the SES; denials of within-grade increases for general schedule employees; determinations affecting the rights or interests of individuals or of the United States under the Civil Service Retirement System or the Federal Employees Retirement System; negative suitability determinations; terminations during probationary periods or during the first year of veterans readjustment appointments; terminations during managerial or supervisory probationary periods; separations, reductions in grade, or furloughs for more than 30 days in connection with reductions in force; furloughs of SES career appointees; and failures to restore former employees following military service or following partial or full recovery from compensable injuries. Appeals also may involve allegations of reprisal for "whistleblowing," either as an Individual Right of Action or as an affirmative defense raised in connection with an otherwise appealable matter, as well as allegations of discrimination and/or other prohibited personnel practices. (Most Executive Branch employees may appeal to the Board, as may many employees of the U.S. Postal Service and the Tennessee Valley Authority.)

Major Duties

The purpose of this position is to provide the incumbent the opportunity to gain the knowledge and skills

necessary to serve as an administrative judge (AJ) whose principal duty is to adjudicate appeals. Toward that end, and as part of his/her training, the incumbent conducts basic legal research to assist higher-graded AJ's, to develop a level of subject matter knowledge, and to develop reference materials for the regional office, and prepares memoranda, outlining and analyzing the application of legal principles and precedents, and justifying the recommendations and conclusions. In addition, under the guidance of the Chief AJ or a Senior AJ, the incumbent adjudicates a limited number of the office's least complex cases, including simple jurisdiction and timeliness cases, and cases which are procedurally straightforward, with clear-cut fact patterns, such as simple retirement cases, suspensions, and demotions. The impact of these cases is unlikely to extend beyond the parties involved, to have a major effect on the Federal personnel system, or to generate significant public interest.

As part of the incumbent's adjudicatory function, he/she must perform the following: Conduct prehearing and status conferences; advise the parties with regard to their respective burdens of proof, duties, and responsibilities; advise the parties with respect to settlement negotiations and assist them with that process; conduct hearings; and issue initial decisions from which an appellant may appeal directly to the U.S. Court of Appeals for the Federal Circuit or, when issues of prohibited discrimination are involved, to the appropriate U.S. district court.

In order to accomplish these tasks, the incumbent has the authority to: Administer oaths and affirmations; rule on offers of proof and receive relevant evidence; issue subpoenas with the approval of the Chief AJ or a Senior AJ; rule on simple discovery motions; resolve credibility issues; and ensure that the record is fully developed. The incumbent also rules on all motions, witness lists, and proposed exhibits. The incumbent may require the parties to file memoranda of law and to present oral arguments with respect to any question of law, order the production of evidence and the appearance of witnesses, impose sanctions, enforce orders and settlement agreements, and grant interim relief and attorney fees to prevailing appellants.

Supervision and Guidance Received

The Chief AJ (Regional Director) or a Senior AJ points out key issues and advises the incumbent on appropriate research methodologies and related matters. Although closely supervised throughout the course of his/her work, the incumbent independently plans, organizes, and conducts the work. The Chief AJ or a Senior AJ reviews all work for soundness of analysis, application of legal principles and precedent, and consistency with governing policies and Board

procedures and regulations. Where appropriate, the Chief AJ or a Senior AJ suggests revisions and/or additional research. Notwithstanding, the incumbent retains signatory authority for his/her assigned cases.

Mr. McCLOSKEY. Since we are proceeding somewhat informally right now, do you want to comment how these constraints on decisional independence are manifested?

You saw Mr. Broida, and heard some of the other conversations today. Well, what are these constraints?

Are they active constraints or is it just a fear or an insecurity that is involved here?

Judge JACKSON. I think it is really more of a fear and insecurity, and also a perception problem. I think Judge Markuns will speak more on this point.

But I can honestly say that I have never been directed as to the bottom line of a case. However, I have been questioned regarding the bottom line in a quality review. And these are——

Mr. McCLOSKEY. Could you describe that questioning, a little bit out of your workday world? But what was the subject matter, what kind of case was it, and what kind of point were they trying to get to, in essence, informally counsel you?

Judge JACKSON. Well, I wouldn't really call it an informal counseling. The Board is set up—we have, of course, a regional office, and we also have headquarters or the national office. And as part of the national office, it has a regional operations component, which part of its function or sometimes part of its function is to review administrative judges' decisions. And it is during the course of these reviews that the bottom line of my decisions have only on two occasions been questioned.

Mr. McCLOSKEY. We heard from general counsel today that, I think I heard, they do not go into the actual substance, rationale or whatever.

Judge JACKSON. I heard that as well. I am sorry.

Mr. McCLOSKEY. Evidently, A, are you saying they do, or at least on two occasions they have with you?

B, I would like to know in shorthand, if you can recall, the substance of those discussions?

What type of cases, what kind of point were they trying to get to?

Judge MARKUNS. Mr. Chairman, with your permission, could I speak to you for a moment?

Mr. McCLOSKEY. Surely.

Just trying to——

Judge MARKUNS. Just to try to give you an overview of the concern, again, focusing on the APA, one of the——

Mr. McCLOSKEY. Mr. Markuns, I am asking—if Ms. Jackson doesn't want to answer the question, I am not here to be, overly assertive, but I think it might help educate, if we let her say surely, what these conversations were, what kind of substance were they trying to get to.

Do you remember or will you be willing to say?

Judge JACKSON. Yes, I can recall. And I am willing to say.

One I am hesitant to talk about because it is still in the system. It is not——

Mr. McCLOSKEY. You don't have to state the case or the specifics, but what kind of case and what kind of point were they trying to make?

Judge JACKSON. Okay. They were both sexual harassment cases. And both cases involved a mitigation by me, and in both cases I was questioned, or it was indicated to me that they questioned the appropriateness of that mitigation.

Mr. MCCLOSKEY. And by mitigation, meaning?

Judge JACKSON. Mitigating the penalty.

Mr. MCCLOSKEY. Okay.

Judge JACKSON. That is that I did not sustain the agency action.

Mr. MCCLOSKEY. Okay. Okay.

Thank you.

Judge MARKUNS. Mr. Chairman——

Mr. MCCLOSKEY. Mr. Markuns, please proceed.

Judge MARKUNS. Okay, thank you.

Mr. Chairman, parenthetically, in a response to your earlier question about the rating system, I would like to read into the record, for example, one criteria that is written directly into the judge's performance standards, and that we are subject to in our annual performance ratings. And traditionally these ratings have been used to award us a cash awards on an annual basis in January of each year. For example, fully successful performance is determined to be—to include performance generally reflects appropriate recognition and consideration of relevant facts——

Mr. MCCLOSKEY. I am sorry, Mr. Markuns. I am having—I am not the only one having trouble hearing you.

Could you try to bring the mike over, maybe talk just a little bit slower? The acoustics aren't the greatest.

Judge MARKUNS. In our performance standards, we have among the elements an element of quality of decisions. And one of the criteria set forth in that rating standard is whether we appropriately recognize and consider relevant facts, evidence and authority bearing on issues.

I am reading, I am reading directly from our rating. Our regional directors are required to rate us on our performance on every case in which we render a decision, applying, among other things, that standard.

There is a second level supervisor in Washington who also applies that standard. As I tried to point out in our written statement, we will continue to have a concern every time we render a decision, in the back of our minds, whether we are in—we and our supervisors have a meeting of the minds on how we are issuing our decisions.

Now, we hope that we are discounting these concerns as we make our decisions, but it is always there. And the APA does provide a framework to protect judges so that they can render independent decisions, by separating pay from ratings. It is not primarily a pay——

Mr. MCCLOSKEY. Mr. Markuns, at what point are they rating you on these decisions?

Do you get rated as you go, sometimes like cases in process?

Judge MARKUNS. Yes. Well, we have a midyear review, then we have an annual rating. However, even under the new position descriptions that we have been recently assigned to, regional directors are still required to conduct a pre-issuance review in complex cases, which means that before we actually sign our decision, we

have to bring the file into the regional director's office for his or her review.

Now, I have been working in the Boston regional office for 13 years. I worked under the same supervisor for 13 years. We probably think much alike and we probably anticipate each other's moves. I mean, it can occur. But the fact of the matter——

Mr. MCCLOSKEY. It is a good professional relationship?

Judge MARKUNS. But that process is there, that process is there.

Mr. MCCLOSKEY. So actually, in essence, you have case discussions with your administrative supervisor before you issue any final decisions?

Judge MARKUNS. Right, right. And from a judge's standpoint, from a judge's standpoint, it is one thing if you are a judge collegially talking to your colleagues or your supervisor about a case before you sign it to make sure that it is logical, and so forth, but if in that process you receive a suggestion from your supervisor and that supervisor is responsible for your rating, it takes on a different weight than if it were simply a constructive idea that would make the decision better.

Mr. MCCLOSKEY. It would be hard to scrub these discussions of substance or suggestions as to the way the decision should come out; right?

Judge MARKUNS. Well, you know, you can imagine the type of issues that we have to decide. And we have an awful lot of independence and discretion, up to the point of issuance of decision. I mean, we are making decisions all the time, right to the pre-hearing stage, and as we make rulings on discovery and as we make rulings during the hearing itself, that could materially affect the outcome.

However, when you get down to the very end of a decision that you have to render on the merits, I think that any discussions take on a new weight. And it is just part of the process.

Mr. MCCLOSKEY. And it is—so ALJ's have any such case conferences or evaluations before the final decision?

Judge MARKUNS. In my review——

Mr. MCCLOSKEY. I don't know that they do.

Judge MARKUNS. It is limited, but, for example, the Social Security administrative law judges, I have looked at their position description, for example, and there is no required review of their decisions before they are rendered. In fact, the Board has now said that in noncomplex or routine cases, we are no longer subject to pre-issuance review, and, in fact, in those cases, you know, we do sign cases now without the regional director seeing them at all.

However, even there we get post-issuance review and it is—it does affect our performance rating. The quality review that Judge Jackson referred to was that type of review.

Again, however, it does—you have to be a special human being to just totally take that out of your mind. And these are tough cases. These are very tough cases.

Mr. MCCLOSKEY. I understand here.

Judge MARKUNS. The whistleblower cases are becoming more and more complex and controversial, and I would suggest that the protections of case rotation and separating pay from ratings would really improve the system.

I represented Federal employees for several years before I became an employee of the Board. I lobbied on the reform act on behalf of my labor organization. And I would suggest to you that this would be a genuine reform and perhaps would address that perception problem we have heard expressed this morning.

Mr. MCCLOSKEY. Judge Jackson, do you—is there—is there any ability or criteria, distinction between your status and ALJ's?

I believe from your testimony, you say it is not the case at all, you are equally experienced, very similar, identical qualifications; is that is right?

Judge JACKSON. Yes. I think most of the seasoned ALJ's at the Board would meet OPM criteria. We do have several newly hired employees, and I am unsure about their qualifications, whether or not they would meet that criteria.

Mr. MCCLOSKEY. I am sorry, could you repeat that?

Judge JACKSON. I am unsure about the last judges hired by the Board. We had a group of judges, about eight or nine, I believe, who were recently hired by the Board and I am unsure about their qualifications to meet the ALJ standards.

Mr. MCCLOSKEY. But you don't know that they don't meet them or there is a problem, it is just a question of active knowledge then?

Judge JACKSON. Right. For the vast majority of us, I am—I can state with almost certainty that we can.

Mr. MCCLOSKEY. Well, that is helpful.

Are there any other points you want to add?

I think, the issue is rather stark and basic. I talked to Mr. Erdreich, and I have had discussions today, he claims to have an open mind on this and with his staff here, I would be very interested in having discussions with the agency, as to this consulted process and how it affects either the substance or the appearance or the sense of independence.

It is very interesting. Even though you should be possibly constrained in that status, if you will. Obviously, does that make sense to you?

Judge MARKUNS. Mr. Chairman, we would appreciate any contribution that the subcommittee could make in this area. We would ask that you possibly consider, again, H.R. 1889 or some amendment to the reauthorization.

Mr. MCCLOSKEY. Oh, I understand you are looking for legislation. That is on the table, so to speak.

Judge MARKUNS. Right. But I—in terms—we are ready to—we are certainly willing and ready to cooperate and provide any information as an association that might be helpful in understanding this issue. We tried to be as forthcoming as we could in our written testimony and provide some detail to the committee regarding how we see such a conversion taking place.

Mr. MCCLOSKEY. What other agencies have similar status judges rather than ALJ's?

Judge MARKUNS. There are several.

I would also direct the subcommittee's attention to the recent ACUS recommendation, 92–7, that at least discussed, and in its background materials discussed the types of agencies that have administrative judges. I would also suggest that at least a portion of

the ACUS report that addresses how conversions might take place would be helpful, because they suggest that really what needs to be done is that you take a look at the class of cases that an individual agency hears, and determine whether those cases warrant having independent adjudicators hear and decide them.

And each agency addresses different issues. The disputes that they are charged with deciding are different. The interests vary.

We would suggest that the class of cases that are heard by the MSPB warrant being heard by administrative law judges. And again going back to the Civil Service Reform Act, I would remind the subcommittee that as early as 1978, in considering the initial passage of the act, there was a proposal made that these cases be heard by administrative law judges. And that idea was rejected only because of "serious administrative problems," I believe, was the term the conference report used.

Mr. MCCLOSKEY. You wouldn't say compensation is a matter of indifference to you; would you?

Judge MARKUNS. It is not a matter of indifference, however, Mr. Chairman, not at all. As a matter of equity and professional development, I mean we sincerely believe that our work is complex and we work as hard as administrative law judges in our work and that we deserve the compensation.

However, we are pragmatic. We would—we would certainly—we understand the constraints of government. We, I think, have tried to work as hard as anybody in saving money for the government in how we do our work.

We make extensive use of conferencing and telephone conferences, and so forth. I would also suggest that just one case, by deciding correctly or where a judge had properly facilitated settlement, avoiding reversal by the Board, EEOC or the courts, could save the government the entire first year cost of this legislation. And we are, as I say, trying to be—you know, we are reasonable and pragmatic about this, but it is not simply a matter of cost.

There are real systemic concerns here and it seems that this, 15 years into the reform act, this would be a good time, we would suggest, for the subcommittee to address.

Mr. MCCLOSKEY. Sure, I understand that. You both presented your ideas very well. Most of it makes good sense.

Are there any limits on agencies, the agency's discretion to assign cases?

Judge JACKSON. Not as far as I am aware, no.

Judge MARKUNS. No, there are no written guidelines. There are no guidelines at all. It is up to the regional director to assign cases.

Mr. MCCLOSKEY. So the director, in essence, can assign cases as to his or her subjective opinion of the proclivity or——

Judge MARKUNS. Right. Most of the regional directors certainly try to even out the work load, but beyond that, there are no—there simply are no set policies in place that govern the assignment of cases.

Mr. MCCLOSKEY. Are you in favor of a more neutral rotation system?

Judge MARKUNS. That is what we would suggest. That is consistent with the APA. We think there were good and sound reasons for it being placed in the law.

Mr. McCLOSKEY. Is there anything else either of you would care to add?

Anything we didn't cover?

Judge JACKSON. No.

Thank you very much.

Judge MARKUNS. We do appreciate the attention you have given to this.

Mr. McCLOSKEY. Thank you, Judge Jackson and Judge Markuns. We will consider very sincerely and followup with Mr. Erdreich on that issue. He said within 30 to 60 days, he would give me a steer as to his views.

I thank you very much, both of you.

Judge MARKUNS. Thank you.

Mr. McCLOSKEY. The hearing is adjourned.

Thank you so much.

[Whereupon, at 12:03 p.m., the subcommittee was adjourned.]

[Additional material for the record follows:]

PREPARED STATEMENT OF ROBERT M. TOBIAS, PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. Chairman, on behalf of the 150,000 employees represented by NTEU, I'd like to thank you for affording me the opportunity to submit my statement for the record on the issue of the Reauthorization of the Merit Systems Protection Board.

The Merit Systems Protection Board plays an important role for many federal employees. It hears approximately 10,200 cases annually on subjects including: whistleblower protection, prohibited personnel practices disciplinary and discharge cases, gender or racial discrimination, and retirement benefits. Without question, these are all issues that face our members. Nevertheless, we have little contact with the Merit Systems Protection Board.

The Civil Service Reform Act of 1978 affirmed the right of federal employees to form and to join a union and to participate in union activities. Under this Act, each employee who is not a supervisor or management official in a covered agency, has the right to form, to join, or to assist a labor organization. These rights include such activities as acting as a labor union representative, presenting the union's views to agency authorities, other government officials, and Congress, and engaging in collective bargaining.

The CSRA requires that each negotiated agreement contain a grievance procedure. Furthermore, each grievance procedure must provide for the binding arbitration of unresolved grievances. By law, the invocation of this arbitration provision may be made only by the union or the agency, and not by an individual grievant. However, on many matters including discharges, certain discipiinary matters and gender or racial discrimination matters, an employee may forgo the grievance arbitration route and instead employ the MSPB. Although far less costly for an employee and the union, we almost never find ourselves recommending the MSPB as a forum.

We have constantly been left with the perception that the MSPB is not a friendly forum for employees. The perception has been solidified by many practices and procedures at the Board. The record shows that appellants lose approximately 80% of all cases, with some regions reaching above 90%. There is a significant difference between the number of times the Board rules against an employee and the number of times an Arbitrator rules against an employee. Arbitrators, given virtually identical sets of facts, seem to be more sensitive to the plight of employees.

There is also an extremely long delay in processing a case before the MSPB. There is no regulatory or statutory imposition of time lines imposed upon the Board. This delay presents a significant hardship for the employee as well as the government.

The unemployed employee is left in limbo with decreasing financial resources. The government, if it is not the prevailing party, must pay large amounts of back pay without the benefit of the employee's service. The employee's position is either left vacant until the resolution of the case or, if filled, an employee must be relocated to accommodate the prevailing employee. There appears to be no legitimate reason why the Board is not statutorily mandated to resolve cases under a given time frame, subject to unforeseen and unusual circumstances.

Many concerns have also been raised about the complexity of the law and procedures followed by the Board. It is clearly not a user friendly system. Despite its complexity, the Board is stringent in its application of its rules. A dismissal for a minor technicality is not uncommon. This complexity presents an additional burden to the employee. The Agency is the named party in cases before the Board. Therefore, the employee, for example, accused of discrimination, has an attorney provided by the Agency. The appellant often does not have the funds or may not be covered under a collective bargaining agreement, and therefore is placed at a serious disadvantage to the opposing party. Judges should play a more active role to ensure that employees are aware of the Boards rules and regulations.

Finally, many concerns have been raised about the MSPB's ability to enforce the Whistleblower Protection Act. Problems have arisen over the definition of whistleblower activity and an employee's right to seek a stay over alleged retaliation. Reform of the Office of Special Counsel is also a necessary step toward ensuring whistleblower protection.

We have heard positive things about the new Board Chairman, Ben Erdreich. His background makes him well suited for the many challenges which lie ahead. We welcome the opportunity to work with him in making some of these noted changes to the MSPB.

PREPARED STATEMENT OF VINCE PALLADINO, PRESIDENT, NATIONAL ASSOCIATION OF POSTAL SUPERVISORS

Mr. Chairman, I am Vince Palladino, president of the National Association of Postal Supervisors. I am submitting this testimony for the record on behalf of over 36,000 active and 3,000 retired postal supervisors and managers. When NAPS members were provided access to the Merit Systems Protection Board (MSPB) appeal process in 1987 it was one of the most significant moments in the history of this organization, which was founded in 1908. Therefore we are particularly interested in the committee's and the Congress' consideration of the reauthorization of MSPB.

As background information, the need for a fair adverse action appeal process for all Post Office Department managers existed well before Congress passed the Postal Reorganization Act in 1971. At that time, however, the situation changed noticeably when the new U.S. Postal Service implemented an internal review system defined in the agency's Employee and Labor Relations Manual section 650. The system was never well received, primarily because most considered it inherently unfair and because of the length of time required to resolve appeals.

By 1985 the increase in adverse actions against supervisors and the level of frustration with the section 650 process was so great NAPS sought relief through a change in Title 39 of the U.S. Code. At that time only preference-eligible supervisors could appeal adverse actions through MSPB. In 1987 Congress approved a bill extending MSPB rights to all postal managers (PL 100–90).

Since that time supervisors have successfully appealed the majority of the adverse actions taken against them through MSPB, where cases are resolved in less time than was the case under the section 650 process. The mere existence of PL 100–90, in fact, has encouraged senior postal management to seek less contentious ways of resolving disputes and discouraged frivolous cases, saving the agency and its managers time and money. As important, our members believe their cases receive fair consideration from an independent authority.

The only problem left unresolved since passage of the MSPB bill has been the issue of applicability. Most NAPS members are in positions covered by the Executive and Administrative Schedule (EAS), and most EAS employees have MSPB rights. There remains, however, a small number of these individuals whom the Postal Service has repeatedly denied MSPB rights on the grounds that, while they are part of postal management, they do not directly supervise employees. According to the Postal Service, these employees may form a collective bargaining unit, something they have declined to do. The postal unions likewise have shown no interest in organizing these EAS employees.

NAPS has questioned this extremely narrow interpretation of the law by filing three court cases. We recently received a favorable decision in a federal appeals court. MSPB, however, is now seeking the court's reconsideration of the removal decision. We had hoped the Postal Service would concede our position, but the agency has refused to do so prior to a decision on MSPB's motion for reconsideration.

While we believe we will eventually win MSPB rights for all EAS employees through the courts, we may at some point request a revision of Title 39 to clarify MSPB eligibility once and for all, so that no future court cases will be needed should

the Postal Service adopt new pay schedules and use this as an opportunity to again deny postal managers the rights Congress intended them to enjoy.

In conclusion NAPS encourages the subcommittee to reauthorize permanently the Merits Systems Protection Board which we believe provides an invaluable and irreplaceable appeals process for postal supervisors.

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